TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 97

UNITED STATES OF AMERICA, PETITIONER,

vs.

UNION PACIFIC RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 21, 1956

CERTIORARI GRANTED OCTOBER 8, 1956

SUPREME COURT OF THE UNITED STATES

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UNITED STATES OF AMERICA, PETITIONER,

VS.

UNION PACIFIC RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

INDEX

1 In the United States District Court
For the District of Wyoming

No. 3736.—Civil.

UNITED STATES OF AMERICA, PLAINTIFF

vs.

UNION PACIFIC RAILROAD COMPANY, DEFENDANT

COMPLAINT.—Filed April 13, 1954

The United States, by John F. Raper, Jr., United States Attorney for the District of Wyoming, acting under authority of the Attorney General and at the request of the Secretary of the Interior, for its claim states as follows:

1. This is an action brought by the United States and the jurisdiction of this Court is based upon the provisions of 28 U.S.C. 1345.

2. The defendant, Union Pacific Railroad Company, is a corporation duly organized and authorized to do business under the laws of the State of Utah.

3. Under the Act of July 1, 1862, 12 Stat. 489, as amended by the Act of July 2, 1864, 13 Stat. 356, the United States granted to a predecessor in title of the defendant a right-of-way 400 feet in width through the public lands of the United States for the construction of a railroad and telegraph line. The defendant has succeeded to the rights of the original grantee and is now operating a railroad over the right-of-way so acquired.

4. A portion of the right-of-way granted by the described Acts of Congress, and now used by the defendant in operating and maintaining a railroad traverses land owned by the plaintiff described as the N½ NW¼. Section 24, T. 13 N., R. 68 W., 6th P.M., in the State of Wyoming.

5. Under the Act of July 1, 1862, 12 Stat. 489, as amended by the act of July 2, 1864, 13 Stat. 356, the defendant acquired the right to use the granted right-of-way only for railroad and telegraph line purposes. It acquired no right to use any portion of the
2 right-of-way to drill for or remove subsurface oil and minerals. The oil and mineral deposits underlying the right-of-way remain the property of the United States and subject to its control and disposition.

6. The defendant, Union Pacific Railroad Company, is claiming that it has a right to use the right-of-way not only for railroad and telegraph purposes, but also for the purpose of entering thereon to engage in drilling operations leading to removal of the subsurface oil and gas. In particular, the defendant has applied to the Wyoming Oil and Gas Conservation Commission for a permit to drill a well for oil and gas on a portion of its right-of-way traversing the NE¼ NW¼ of Sec. 24, T. 13 N., R. 68 W., 6th P.M., in the State of Wyoming. Plaintiff has been informed that the application so filed by the defendant has been approved by the mineral supervisor of the State of Wyoming.

7. Any use of the right-of-way for drilling operations or for the taking of oil, gas and minerals from the subsurface will constitute a violation of the terms and provisions of the Act of July 1, 1862, 12 Stat. 489, as amended, whereby a right-of-way for railroad and telegraph line purposes only was granted by the plaintiff.

8. Unless the defendant is restrained from proceeding with its intention to drill for oil on the right-of-way, the United States will be deprived of its property and the purpose and intent of the aforesaid right-of-way grant will be violated.

9. Although the United States, in the Act of May 21, 1930, 46 Stat. 373, 30 U.S.C. 301, has specifically provided a procedure whereby the defendant may obtain a lease to extract the oil, gas and other minerals from under the right-of-way, the defendant has not applied for or obtained a lease under that act.

Wherefore, Plaintiff demands:

(1) That judgment be entered declaring that the defendant is without right to engage in drilling operations on or to remove, lease or otherwise dispose of the gas, oil or other minerals underlying that portion of its right-of-way described in this complaint;

(2) That an injunction be issued permanently restraining and enjoining the defendant, its agents and assigns, from in any manner using its right-of-way in Wyoming acquired by grant under the Act of July 1, 1862, as amended, for the purpose of drilling for and removing gas, oil and minerals, except under a lease issued pursuant to the provisions of the Act of May 21, 1930, 46 Stat. 373;

3 (3) That judgment be entered quieting plaintiff's title to the minerals underlying said right-of-way.

JOHN F. RAPER, JR.,
United States Attorney,
for the District of Wyoming,
Attorney for Plaintiff

Filed. April 13, 1954.

In United States District Court

ANSWER.—Filed May 21, 1954

Defendant Union Pacific Railroad Company, for answer to the complaint herein, admits, denies and alleges as follows:

First Defense.

1. Admits the allegations of Paragraph 1 of the complaint.

2. Admits the allegations of Paragraph 2 of the complaint.

3. Admits the allegations of Paragraph 3 of the complaint and alleges as follows: Defendant and its predecessors have complied in all respects with the provisions of the Act of July 1, 1862, 12 Stat. 489 as amended by the Act of July 2, 1864, 13 Stat. 356. Among other things, defendant and its predecessors constructed a railroad and telegraph line in accordance with the provisions of said Acts of Congress. Under the Act of July 1, 1862, as amended, defendant received a present grant of the lands contained within the right of way referred to in Paragraph 3 of said complaint. This grant conveyed an estate in said lands in fee simple determinable (sometimes called a base, qualified, or limited fee). The United States has only an implied possibility of reverter in the event that defendant ceases to use the right of way. Defendant, or a predecessor thereof, is now and has been at all times pertinent hereto using the right of way and defendant intends to continue to do so. No portion of the right of way has been abandoned.

4. Denies the allegations of Paragraph 4 of the complaint except admits and alleges as follows: Defendant admits that a portion of the right of way granted by Acts of Congress and now used by defendant in operating and maintaining a railroad traverses land described as the N ½ NW ¼ of Sec. 24, T. 13 N., R. 68 W., 6th P.M. in the State of Wyoming. Defendant also admits that with the exception of the lands within the right of way, title to said described land is in plaintiff. Defendant alleges that plaintiff's only interest in said right of way is an implied possibility of reverter and that all other right, title and interest in said right of way is in defendant.

4 5. Denies the allegations of Paragraph 5 of the complaint. Defendant alleges that under the Act of July 1, 1862, granting the right of way to defendant for railroad and telegraph purposes, defendant acquired the sole and unrestricted right to drill for, remove, use and dispose of the subsurface oil and other minerals underlying the right of way. Defendant further alleges that its proposed drilling operations and the removal, use or disposal of subsurface oil and other minerals will in no way interfere with the use of the right of way for railroad and telegraph purposes.

6. Admits the allegations of Paragraph 6 of the complaint and

alleges that the application referred to therein has been approved by the Mineral Supervisor of the State of Wyoming.

7. Denies the allegations of Paragraphs 7 and 8 of the complaint.

8. Answering Paragraph 9 of the complaint, defendant admits that it has not applied for or obtained a lease under the Act of May 21, 1930, 46 Stat. 373, 30 U.S.C. 301, but denies that the provisions of such Act have application to this defendant in so far as any portion of the right of way granted by the Act of July 1, 1862, as amended, is concerned.

Second Defense.

Under the Act of July 1, 1862, as amended, defendant was granted a right of way 400 feet in width through the public lands of the United States for the construction of a railroad and telegraph line. Under the Act of July 1, 1862, as amended, defendant received a present grant of the lands contained within the right of way referred to in Paragraph 3 of said complaint. This grant conveyed an estate in said lands in fee simple determinable (sometimes called a base, qualified, or limited fee). The United States has only an implied possibility of reverter in the event that the defendant ceases to use the right of way. Under the Acts of Congress, the law of the United States and the law of the State of Wyoming, the right to drill for, remove, use or dispose of the subsurface oil and other minerals passed to defendant with and as a part of the grant of the lands within said right of way. Defendant's proposed drilling and the removal, use or disposal of subsurface oil and other minerals will in no way interfere with the use of the right of way for railroad and telegraph purposes.

Wherefore, defendant prays for the dismissal of the complaint, for defendant's costs incurred herein, and for such other and further relief as the Court may deem just and proper.

5 Dated this 20th day of May, 1954.

LOOMIS, LAZEAR & WILSON,
JOHN U. LOOMIS,
O'MELVENY & MYERS,
LOUIS W. MYERS,
WILLIAM W. CLARY,
WARREN M. CHRISTOPHER,
Attorneys for Defendant.

FRANK E. BARNETT,
W. R. ROUSE,
J. H. ANDERSON,
HENRY M. ISAACS,
Of Counsel.

Filed with proof of service May 21, 1954.

In United States District Court

STIPULATION OF FACTS—Filed October 20, 1954

The United States of America, plaintiff, and the Union Pacific Railroad Company, defendant, by and through their respective attorneys, hereby stipulate and agree as follows:

1. This is an action brought by the United States, and the jurisdiction of this Court is based on the provisions of 28 U.S.C. 1345.

2. Defendant, Union Pacific Railroad Company, is a corporation duly organized and authorized to do business under the laws of the State of Utah.

3. By the Act of July 1, 1862, 12 Stat. 489, as amended by the Act of July 2, 1864, 13 Stat. 356, the United States granted to a predecessor in title of the defendant a right of way 400 feet in width through the public lands of the United States for the construction of a railroad and telegraph line.

4. Defendant, Union Pacific Railroad Company, has succeeded to the rights of the original grantee under said Acts.

5. Defendant and its predecessors have complied in all
6 respects with the provisions of the Acts of Congress referred to in Paragraph 3 hereof. A predecessor of defendant constructed a railroad and telegraph line on the right of way referred to in said Paragraph 3. Defendant, or a predecessor thereof, is now and has been at all times pertinent hereto using the right of way for the purposes set forth in said Act of July 1, 1862. No portion of the right of way involved in this action has been abandoned.

6. Defendant claims that under the Acts of Congress set forth in Paragraph 3 hereof, it received a present grant in fee simple determinable (sometimes called a base, qualified or limited fee) of the lands contained within the right of way and acquired the sole and unrestricted right to drill for, remove, use, and dispose of the subsurface oil, gas, and other minerals underlying the right of way. Plaintiff claims that the defendant acquired the right to use the right of way only for railroad and telegraph purposes, that defendant acquired no right to use any portion of the right of way to drill for or remove subsurface oil and minerals, that the oil, gas, and mineral deposits underlying the right of way remain the property of the United States and subject to its control and disposition, and that plaintiff is entitled to the relief prayed for. The purpose of this case is to adjudicate those claims and determine the relative rights of the United States and the defendant in the oil, gas, and other minerals underlying the right of way.

7. Defendant intends to engage in drilling operations leading to the removal of subsurface oil and gas underlying its right of way traversing the N½ NW¼ of Sec. 24, T. 13 N., R. 68 W., 6th

P.M., in the State of Wyoming. The Wyoming Oil and Gas Conservation Commission has approved defendant's application for a permit to drill a well for oil and gas on said portion of defendant's right of way.

8. Defendant has not applied for or obtained a lease under the Act of May 21, 1930, 46 Stat. 373, 30 U.S.C. 301.

9. Paragraph 4 of the complaint shall be considered amended to read as follows:

A portion of the right of way granted by the described Acts of Congress, and now used by the defendant in operating and maintaining a railroad traverses land described as the N½ NW¼, Section 24, T. 13 N., R. 68 W., 6th P.M., in the State of Wyoming wherein the plaintiff is the owner of the mineral rights.

Paragraph 4 of the answer shall be considered amended to read as follows:

Denies the allegations of Paragraph 4 of the complaint except admits and alleges as follows: Defendant admits that a
7 portion of the right of way granted by Acts of Congress and now used by defendant in operating and maintaining a railroad traverses land described as the N½ NW¼ of Sec. 24, T. 13 N., R. 68 W., 6th P.M., in the State of Wyoming. Defendant also admits that with the exception of the lands within the right of way, title to the mineral rights in said described land is in plaintiff. Defendant alleges that plaintiff's only interest in said right of way is an implied possibility of reverter and that all other right, title and interest in said right of way is in defendant.

10. A portion of the right of way granted by the Acts of Congress referred to in Paragraph 3 hereof traverses land described as the N½ NW¼ of Sec. 24, T. 13 N., R. 68 W., 6th P.M., in the State of Wyoming. The nature of the title to and the parties' interest in said portion of the right of way is the subject of this litigation. Other than such right of way, there is no dispute that the title to the mineral rights in the land described in this paragraph is and at all time pertinent hereto has been vested in the United States.

11. By the use of the term "right of way" the parties do not agree as to the nature or extent of the property or estate conveyed, and nothing herein shall be construed as barring either party from making any argument with respect to the nature or extent of the estate or property, or the incidents of title held by defendant, Union Pacific Railroad Company, under the Acts of Congress referred to in Paragraph 3 hereof.

12. Each of the parties hereto reserves the right, upon the trial of said cause, or at any hearing thereof, to introduce other testimony,

oral or documentary, not inconsistent with the facts herein stipulated.

13. This stipulation shall be introduced in evidence at the trial of this case.

14. This stipulation is for the purpose of this case only, and is made without prejudice to the rights of either party in any other action and may not be used by or against either party in any other action.

15. This stipulation does not supersede or eliminate from the consideration of the Court the pleadings in this action.

8 Dated October 20, 1954.

JOHN F. RAPER, JR.,
United States Attorney.
THOS. L. MCKEVITT,
Attorney, Department of Justice,
Attorneys for Plaintiff.
JOHN U. LOOMIS,
WILLIAM W. CLARY,
WARREN M. CHRISTOPHER,
Attorneys for Defendant.

Filed October 20, 1954.

In United States District Court

JUDGE'S MEMORANDUM.—December 30, 1954

KENNEDY, Judge.

Dated December 30, 1954.

This is an action in which the United States, as plaintiff, seeks an injunction permanently restraining the defendant from using its right of way as a railroad for the purposes of removing gas, oil and minerals therefrom and quieting title to such minerals in plaintiff. The defendant answers in the form of a denial of the claim of plaintiff and sets forth certain affirmative rights claimed in its behalf.

At the trial the parties entered into an agreed statement of facts which eliminated practically all oral testimony except that presented on behalf of the defendant concerning its use of its right of way for the purpose of producing oil and gas as not interfering in any way with the operation of its railroad.

Reviewed, briefly, the stipulation of facts set forth the jurisdiction of the court; the corporate organization of the defendant and that it is the successor to all the rights of the original grantee under a right of way over the public domain under the Acts of July 1, 1862, as amended by the Act of July 2, 1864, for railroad and

telegraph line purposes, and that it has continuously exercised such right up to the present time; that defendant intends to engage in drilling operations leading to the removal of subsurface oil and gas underlying its right of way a few miles west of the city of Cheyenne and that the Wyoming Oil and Gas Conservation Commis-
9 sion has approved defendant's application for a permit to drill on that portion of defendant's right of way; that defendant has not applied for or obtained a lease under the Act of May 21, 1930, from the United States; and that the matter in dispute between the parties is as to the nature and extent of the property or estate which defendant holds under the Acts of Congress referred to.

In addition to the stipulation the defendant over the objection of the plaintiff as to relevancy introduced evidence tending to show that the drilling and operation of oil and gas wells on the right of way would in no way interfere with the operation of its railroad and telegraph line facilities. This evidence was admitted over the objection of the plaintiff at the time upon the theory that being a Court-tried case the evidence might be rejected if not found pertinent to the issue involved. After the trial the case was presented to the Court extensively in oral argument and at the conclusion, inasmuch as it had been intimated that briefs had been exchanged by the parties previous to the argument, it was suggested by the Court that such trial briefs should be submitted with such additional addenda as counsel might be advised within a time fixed by the Court. This order has been complied with and the matter is now before the Court for consideration.

It would seem that the particular issue here to be resolved heads into virgin legal territory, as counsel seem to agree that there are no cases which form a precedent as being on all fours with the case at bar. In some respects it would seem unfortunate that perhaps on account of the particular area involved being within the Wyoming District (the location being only a few miles west of the city of Cheyenne) the lot falls to the presiding judge of the United States trial court of such District to first attempt a solution of the problem. Probably the most efficient service that this Court may render is to expedite its journey into the higher Federal Courts so that the rights of the parties may be declared as speedily as possible. With this in view this Court will attempt to state its views and reactions only to the extent that adequate findings and conclusions may be based thereon.

It appears that the original grant to the defendant's predecessor was a right of way to the extent of two hundred feet in width on each side of said railroad where it may pass over the public lands, including necessary grounds for stations, etc. When the grant did not appear adequate to secure construction of the railroad an

amended Act was passed in 1864 which continued the original grant as a right of way but also granted to the railroad alternate additional sections on each side in fee simple but reserving or excepting therefrom mineral rights or lands, with certain exceptions.

Scores of cases have been cited by counsel which in a sense touch only the periphery of the exact question here to be determined. It would seem rather unnecessary to discuss them in detail in this memorandum. Suffice it to say that counsel are to be commended for the exhaustive manner in which they have prepared their respective contentions and demonstrated their exhaustive research of the authorities in presenting the case to this Court.

Among the many cases so cited may be mentioned Northern Pacific Railroad Company v. Townsend, 190 U.S. 267, and Great Northern Railway Company v. United States, 315 U.S. 262, out of which counsel for plaintiff seem to derive some comfort from the language of these decisions. This is seriously questioned, however, by counsel for defendant, inasmuch as the situation calling for a decision in these cases is not analogous to the situation in the case at bar. Two of the cases strongly relied upon by defendant are New Mexico v. United States Trust Company, 172 U.S. 171, and United States v. Illinois Central, 89 F. Supp. 17 (affirmed United States v. Illinois Central, 187 F. 2d 374). Perhaps the latter case comes nearer to suggesting a precedent in the case at bar than any others inasmuch as it definitely decided that the defendant under a right of way originally granted by the United States to a State had a right to extract oil therefrom and that the United States had no present interest in such oil. The New Mexico case, supra, related to the matter of taxation of improvements on a right of way in which the integrity of such right was protected against such taxation. In the Northern Pacific Railroad Company case, supra, the right of way was again protected against homesteaders filing thereon. In the Great Northern Railroad case, supra, the contest was under the right of way Act of March 3, 1875, in which it was decided that the right of way under that Act was an easement only and conferred on the grantee no right to oil or minerals underlying the right of way. This latter case, however, should be considered in connection with the fact that after 1871 the United States modified its policy in connection with grants of this character. After this time rights of way were granted with a more restrictive character than is embraced in the one under consideration here, as, for example, in 1884 Congress exercised its authority to grant a right of way through an Indian Territory which contained a proviso that the lands granted should be used for such purposes only as shall be necessary for the construction and convenient operation of the

railroad, etc. Various attempts have been made to encroach upon the original grants of right of way but generally speaking the courts have consistently operated to protect integrity of such original grants as, for example, in Union Pacific Railroad Company v. Laramie Stockyards Company, 231 U.S. 190, where the attempt was made to acquire title by adverse possession under an Act of Congress authorizing the same, it was held that the Act could not be enforced retroactively as against the original grant. Many of the courts, including that of the Supreme Court, have sought to define this so-called right of way using expressions "determinable right of way with reverter" (if ceased to be used for the original
11 purpose indicated); a "limited" fee; a "qualified" fee; a "base" fee, and it is indicated strongly in these cases and in other texts that the possibility the fee may last forever renders the estate therein a so-called "fee". At least it may be gathered from these authorities that the fee here under consideration being absolute and without restriction except as to possible reverter, is some different sort of a grant other than a mere easement as that term is generally understood.

Some suggestion has been made that the point in controversy might be ruled by Wyoming law inasmuch as the property is located in this state. There seems to be no controlling precedent either in the Wyoming law or the decisions of its Supreme Court. It is not the intention of this Court to indicate that the situation is controlled by the law of the state of Wyoming inasmuch as it involves the construction of a federal statute. However, counsel for defendant derives some comfort in a statement of the Wyoming Supreme Court in Johnson Irrigation Company v. Ivory, 46 Wyo. 221, involving the rights of homesteaders in connection with a Congressional grant of rights of way for ditches, canals, reservoirs and irrigation works, in which citation the Court in its opinion at page 239 uses the following language:

* * * "We may also agree that a grantee who takes a limited or qualified fee, liable to be defeated whenever he ceases to use the land for the purposes specified in the grant, may, while the estate continues, have the same rights and privileges as an owner in fee simple."

Counsel for plaintiff rely also upon administrative precedents as being persuasive and also upon the fact that for years the defendant has never attempted to exercise the right which it now claims, but in the final analysis these points could only be advanced as persuasive and not decisive of the question involved. The courts under a variety of circumstances have held that grants of this character to a railroad may be used for many different purposes

without jeopardizing their so-called title under the grant itself; for example, for the construction of saw mills, warehouses, lumber and coal businesses, irrigation ditches, etc., the only limit being that such leases or privileges would not interfere with the operation of the railroad. The majority of these cases, however, refer to uses of the surface for purposes other than the sole operation of the railroad itself. It would not seem to be a strained construction to say that the use of the surface and the use of the subsurface are equivalent so long as neither interferes with the primary purpose of the grant. And so the main point upon which the decision in the case rests must be in accordance with the contention of the plaintiff that the railroad grantee has only such rights as will permit it to operate as a railroad (excluding all mineral rights), as against the contention of the defendant that it can use its right of way in any way it sees fit except it may not use it in a
12 manner which will interfere with its main purpose in the operation of a railroad. In this respect this Court feels that it must support the contention of the defendant.

It seems significant that when the original grant was amended to include alternate sections on either side of the railroad and therein reserved or excepted mineral rights Congress did not change in any respect the right of way provision, thereby suggesting a plausible theory at least that had it been the intent of Congress to reserve mineral rights under the right of way it would have made the same provision in regard thereto as it did in the grant of contiguous lands. It is apparent that Congress some time after these original grants of right of way were made began to make them restrictive in the sense that they were limited exclusively to the uses necessary for railroad purposes. This likewise would seem to indicate an intent on the part of Congress to change its policy. General Acts of the Congress were passed restrictive in character under which rights of way might be granted over the public domain which are substantially different than the grant in controversy here.

In accordance with the foregoing views the decision of the Court will be for the defendant. Being a case tried to the Court, without the intervention of a jury, it will devolve upon counsel for defendant to formulate findings of fact and conclusions of law, together with an appropriate judgment, which findings and conclusions may include such fundamental declarations as are inherent in the above announced decision, in collaboration with plaintiff's counsel if agreeable and convenient. Such findings, conclusions and judgment may be submitted to the Court on or before January 14, 1955, and an order will be entered accordingly.

Filed December 30, 1954.

In United States District Court

FINDINGS OF FACT AND CONCLUSIONS OF LAW.—January 14, 1955

The above-entitled cause came on for trial by the Court without a jury on November 15, 1954, and the Court, having duly considered all matters before it, including oral and written evidence produced by the parties, the stipulation of facts between the parties, and the arguments and briefs of the parties, and being fully advised in the premises, hereby makes the following findings of fact and conclusions of law:

FINDINGS OF FACT.

1. This is an action brought by the United States, and this Court has jurisdiction pursuant to the provisions of 28 U.S.C. 1345.

13 2. Defendant, Union Pacific Railroad Company (sometimes hereinafter referred to as Union Pacific), is a corporation duly organized and authorized to do business under the laws of the State of Utah.

3. By the Act of July 1, 1862, 12 Stat. 489, as amended by the Act of July 2, 1864, 13 Stat. 356, the United States granted to a predecessor in title of the defendant a right of way 400 feet in width through the public lands of the United States for the construction of a railroad and telegraph line. Said Act of July 1, 1862 also contained a grant in fee simple by the United States to the railroad of certain alternate sections on both sides of the right of way, but this grant of alternate sections contained a specific exception of mineral lands. The Amendatory Act of July 2, 1864 enlarged the grant of alternate sections to the railroad, continuing the exception of mineral lands from such grants but providing that the term mineral lands does not include coal and iron lands.

4. Defendant, Union Pacific Railroad Company, has succeeded to the rights of the original grantee under said Acts.

5. Defendant and its predecessors have complied in all respects with the provisions of the Acts of Congress referred to in Paragraph 3 hereof. A predecessor of defendant constructed a railroad and telegraph line on the right of way referred to in said Paragraph 3. Defendant, or a predecessor thereof, is now and has been at all times pertinent hereto using the right of way for the purposes set forth in said Act of July 1, 1862. No portion of the right of way involved in this action has been abandoned.

6. A portion of the right of way granted by the Acts of Congress referred to in Paragraph 3 hereof traverses land described as the N-½ NW-¼ of Sec. 24, T. 13 N., R. 68 W., 6th P.M., in the State of Wyoming. The nature of the title to and the parties' interest

in said portion of the right of way is the subject of this litigation. Other than with respect to the right of way, there is no dispute that the title to the mineral rights in the land described in this paragraph is and at all times pertinent hereto has been vested in the United States.

7. Defendant intends to engage in drilling operations leading to the removal of subsurface oil and gas within its right of way traversing the N-½ NW-¼ of Sec. 24, T. 13 N., R. 68 W., 6th P.M., in the State of Wyoming. The Wyoming Oil and Gas Conservation Commission has approved defendant's application for a permit to drill a well for oil and gas on said portion of defendant's right of way.

8. Defendant's proposed drilling operations and the removal, use and disposal of subsurface oil and other minerals will in no way interfere with the use of the right of way for railroad and telegraph purposes.

14 9. Defendant has not applied for or obtained a lease under the Act of May 21, 1930, 46 Stat. 373, 30 U.S.C. 301.

10. It has long been the practice of the defendant when entering into leases of portions of its right of way to reserve the right to retake possession for mineral operations.

11. In the Act of July 1, 1862, 12 Stat. 489, it was the intent of Congress, reflecting the Congressional and public policy existing at that time, to grant to the defendant a fee simple determinable in the lands contained within the right of way, subject only to an implied condition of reverter in the event that defendant ceases to use the right of way for railroad purposes. Congress did not intend to reserve or except minerals or mineral lands from said right of way granted to Union Pacific. It was not the purpose of Congress to restrict the right of way granted to Union Pacific exclusively to uses necessary for railroad purposes, and Congress did not intend to place any limitation upon the grant to Union Pacific except the above-stated implied condition of reverter. Subsequent to the grant to Union Pacific and after 1871, Congress changed its policy and passed general right of way acts which were intended to be more restrictive in character than the grant to Union Pacific.

Conclusions of Law.

1. The Court has original jurisdiction of this civil action commenced by the United States under 28 U.S.C. §1345.

2. By the Act of July 1, 1862, 12 Stat. 489, the United States granted to Union Pacific a fee simple determinable, sometimes called a base, qualified or limited fee, of the lands contained within the right of way, subject only to an implied condition of reverter in the event that Union Pacific ceases to use the right of way.

3. By the Act of July 1, 1862, 12 Stat. 489, Union Pacific acquired the sole right to drill for, remove, use, and dispose of the subsurface oil, gas, and other minerals within the right of way.

4. The United States neither reserved nor excepted minerals or mineral lands from the right of way granted to Union Pacific by the Act of July 1, 1862.

5. The estate in the right of way granted to Union Pacific is absolute and without restriction, except as to the implied condition of reverter, and Union Pacific is not restricted in the use of its right of way to railroad purposes only. Union Pacific can use its right of way in any way it sees fit except that it may not use it in a manner which will interfere with the operation of the railroad, and thus Union Pacific can engage in operations for the production of oil, gas and other minerals so long as they do not interfere with the primary purpose of the grant.

6. The United States is not entitled to an injunction restraining Union Pacific from using its right of way for the purpose of drilling for and removing gas, oil and other minerals.

7. The Act of May 21, 1930, 46 Stat. 373, is not applicable in this case because the United States has no interest in the oil and gas within the right of way.

8. The Court overrules the objections made by plaintiff to the evidence presented by defendant's witnesses, Lee S. Osborne, William C. Perkins, Graydon Oliver and William J. Sackriede.

9. The United States is not entitled to the relief prayed for in the complaint, and the complaint should be dismissed.

10. The defendant is entitled to judgment.

Dated: January 14, 1955.

T. BLAKE KENNEDY,
Judge.

No Objections As To Form.

——,
Attorney for Plaintiff.

WARREN M. CHRISTOPHER,
Attorney for Defendant.

Filed January 14, 1955.

In United States District Court

JUDGMENT.—January 14, 1955

This action came on for trial by the Court on November 15, 1954, and the Court having considered the oral and written evidence pro-

duced by the parties, the stipulation of facts submitted by the parties, and the arguments and briefs of the parties, and having this day entered its findings of fact and conclusions of law, it is by the Court this 14th day of January, 1955,

16 Adjudged, ordered and decreed that the defendant have judgment; that the defendant has an estate in a fee simple determinable in its right of way granted pursuant to the Act of July 1, 1862, 12 Stat. 489, subject only to an implied condition of reverter in the event defendant ceases to use the right of way for railroad purposes; that defendant has the sole and unrestricted right to drill for, remove, use and dispose of the subsurface oil, gas and other minerals underlying the right of way so long as such operations do not interfere with railroad operations; that the plaintiff is entitled to no relief against the defendant, and that the complaint be and is hereby disinissed.

T. BLAKE KENNEDY,
Judge.

No Objections As To Form.

——— ———,
Attorney for Plaintiff.

WARREN M. CHRISTOPHER,
Attorney for Defendant.
Filed January 14, 1955.

In United States District Court

NOTICE OF APPEAL—Filed March 10, 1955

Notice is hereby given that the United States of America, plaintiff above, hereby appeals to the United States Court of Appeals for the Tenth Circuit from the final judgment entered in this action on January 14, 1955.

UNITED STATES OF AMERICA,
PERRY W. MORTON,
Assistant Attorney General.
ROGER P. MARQUIS,
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Attorneys, Department of Justice,
Washington, D. C.
JOHN F. RAPER, JR.,
United States Attorney,
District of Wyoming.

Filed March 10, 1955.

17 (By orders of April 6, 1955, and May 25, 1955, the time for docketing the cause in the Court of Appeals was extended to June 23, 1955.)

In United States District Court

STATEMENT OF POINTS TO BE RELIED UPON BY THE UNITED STATES ON APPEAL—Filed June 3, 1955

The United States of America, appellant, pursuant to Rule 75(d), F.R.C.P., makes the following statement of points to be relied upon on appeal:

(1) The district court erred in finding (Fdg. 11) that by the Act of July 1, 1862, 12 Stat. 489, Congress did not intend to reserve from the grant of the right of way the minerals (oil and gas) underlying such right of way, and in finding that it was not the purpose of Congress to restrict the right of way exclusively for uses necessary for railroad purposes.

(2) The district court erred in concluding (Concl. 2) that the defendant acquired a fee simple determinable, a base, a qualified, or a limited fee in the right of way, subject only to an implied condition of reverter, insofar as such conclusion purports to hold that the defendant railroad company has any right, title, or interest in oil and gas and other minerals underlying such right of way.

(3) The district court erred in concluding (Concl. 3) that under the Act of July 1, 1862, 12 Stat. 489, the defendant railroad company acquired the right to drill for, remove, use, and dispose of the subsurface oil, gas, and other minerals within the right of way.

(4) The district court erred in concluding (Concl. 4) that the United States did not reserve or except the minerals underlying the right of way granted by the Act of July 1, 1862.

(5) The district court erred in concluding (Concl. 5) that the estate granted to defendant in the right of way is absolute and without restriction, except as to an implied condition of reverter; and in concluding that the defendant company has any right whatever to engage in operations for the production of oil, gas, and other minerals underlying the right of way.

(6) The district court erred in concluding (Concl. 6) that the United States is not entitled to an injunction restraining the defendant company from using its right-of-ways for the purpose of drilling for and removing gas, oil and other minerals.

18-19 (7) The trial court erred in concluding (Concl. 7) that the Act of May 21, 1930, 46 Stat. 373, has no application to this case and in concluding that the United States has no interest in the oil and gas within the right of way.

(8) The district court erred in concluding (Concl. 9) that the United States is not entitled to the relief prayed for, and in concluding that the complaint should be dismissed.

(10) The district court erred in concluding that the defendant is entitled to judgment.

(11) The district court erred in adjoining that the defendant company has any right, title, or interest in the oil, gas and other minerals in the right of way, and erred in dismissing the complaint.

(12) The district court erred in not finding, concluding, and adjudging that the defendant company has no right, title, or interest in the oil, gas, and other minerals within the right of way, in not finding, concluding, and adjudging that such minerals belong to the United States, and in not adjudging that the United States is entitled to the injunctive relief prayed for.

PERRY W. MORTON,
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Filed June 3, 1955.

Clerk's Certificate to foregoing transcript omitted in printing.

20 In United States Court of Appeals for the Tenth Circuit

Caption omitted

21 In United States Court of Appeals

ARGUMENT AND SUBMISSION—January 3, 1956

Before Honorable Walter A. Huxman, Honorable Alfred P. Murrah and Honorable John C. Pickett, Circuit Judges.

This cause came on to be heard and was argued by counsel, Fred W. Smith, Esquire, appearing for appellant, William W. Clary, Esquire, appearing for appellee.

Thereupon this cause was submitted to the court.

22 In United States Court of Appeals

OPINION—February 24, 1956

Fred W. Smith (Perry W. Morton, Assistant Attorney General, John F. Raper, Jr., United States Attorney, and Roger P. Marquis were with him on the brief) for Appellant;

William W. Clary, (Loomis, Lazear & Wilson, John U. Loomis; O'Melveny & Myers, Louis W. Myers; Warren M. Christopher and Charles H. McCrea were with him on the brief; Frank E. Barnett, W. R. Rouse, J. H. Anderson, and Henry M. Isaacs, of counsel) for Appellee.

Before HUXMAN, MURRAH, and PICKETT, Circuit Judges.

PICKETT, Circuit Judge.

23 The United States brought this action for a determination of its right to oil and gas, or other minerals, underlying a portion of the Union Pacific right of way in Wyoming, and to restrain the Union Pacific Railroad Company from removing oil and gas from such lands. The single question presented is whether the right of way grant in Section 2 of the Act of July 1, 1862, 12 Stat. 489, 491, conveyed to the predecessor of the Union Pacific such title as to entitle it to develop and take the underlying minerals therefrom.[1] On stipulated facts, the trial court found that the Act granted a fee simple determinable, sometimes called a base, qualified or limited fee title in the right of way, subject only to an implied condition of reverter in the event the company ceased to use the right of way for the purpose of the Act, which title carried with

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[1] A stipulation of the parties states their claims as follows:

"6. Defendant claims that under the Acts of Congress set forth in Paragraph 3 hereof, it received a present grant in fee simple determinable (sometimes called a base, qualified or limited fee) of the lands contained within the right of way and acquired the sole and unrestricted right to drill for, remove, use and dispose of the subsurface oil, gas, and other minerals underlying the right of way. Plaintiff claims that the defendant acquired the right to use the right of way only for railroad and telegraph purposes, that defendant acquired no right to use any portion of the right of way to drill for or remove subsurface oil and minerals, that the oil, gas, and mineral deposits underlying the right of way remain the property of the United States and subject to its control and disposition, and that plaintiff is entitled to the relief prayed for. The purpose of this case is to adjudicate those claims and determine the relative rights of the United States and the defendant in the oil, gas, and other minerals underlying the right of way."

it the right to remove the subsurface oil and gas, and other minerals. 126 F.Supp. 646. A judgment was entered dismissing the
24 action.

The aforementioned Section 2 of the Act of July 1, 1862, reads as follows:

> "Sec. 2. *And be it further enacted*, That the right of way through the public lands be, and the same is hereby, granted to said company for the construction of said railroad and telegraph line; and the right, power, and authority is hereby given to said company to take from the public lands adjacent to the line of said road, earth, stone, timber, and other materials for the construction thereof; said right of way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad where it may pass over the public lands, including all necessary grounds for stations, buildings, workshops, and depots, machine shops, switches, side tracks, turntables, and water stations. The United States shall extinguish as rapidly as may be the Indian titles to all lands falling under the operation of this Act and required for the said right of way and grants hereinafter made."

Section 3 grants to the predecessor of the Union Pacific alternate sections over a limited area along the right of way. It provides that "all mineral lands shall be excepted from the operation of the Act." Section 4 fixes the time when patents shall issue for
25 the alternate sections. It is stipulated that the Act has been complied with and it is not contended that the drilling for oil and gas on the right of way will interfere with the operations of the railroad or the use of the right of way for railroad purposes.

The question of the extent of the estate conveyed in the right of way grants under this Act, and similar Acts during the same period, has been before the courts on numerous occasions. As to those grants, it has been held without exception that the railroad received more than a mere easement over the land. The substance of the decisions is that considering the time and the circumstances under which these grants were made, Congress intended to convey a limited fee with an implied condition of reverter to the United States in the event the company ceased to use or retain the land for the purposes for which it was granted. The most important of these are Railroad Co. v. Baldwin, 103 U.S. 426; Missouri, Kansas & Texas Ry. Co. v. Roberts, 152 U.S. 114; New Mexico v. United States Trust Co., 172 U.S. 171; Northern Pacific Ry. v. Townsend, 190 U.S. 267; Clairmont v. United States, 225 U.S. 551; Union Pacific R.R. Co. v. Laramie Stock Yards Co., 231 U.S. 190; Missouri, Kansas & Texas Ry. Co. v. Oklahoma, 271 U.S. 303. These

cases illustrate that the Supreme Court had a clear understanding of the accepted meaning of the terms "easement", "right of way", "limited fee", and "fee title". The grants considered in the foregoing cases were all made during the period 1850 to 1871. During this period it was considered of utmost national importance
26 that a railroad be constructed to the west coast of the United States and to other areas of the west and northwest. Indeed, the Supreme Court, in referring to the Union Pacific grant, said in United States v. Union Pacific R.R. Co., 91 U.S. 72, 79, that "many of the provisions in the original Act of 1862 are outside of the usual course of legislative action concerning grants to railroads, and cannot be properly construed without reference to the circumstances which existed when it was passed."[2] At the time Congress

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[2] These circumstances, the court described in part as follows:

"The war of the rebellion was in progress; and, owing to complications with England, the country had become alarmed for the safety of our Pacific possessions. * * * It is true, the threatened danger was happily averted; but wisdom pointed out the necessity of making suitable provisions for the future. This could be done in no better way than by the construction of a railroad across the continent. * * *

"Although this road was a military necessity, there were other reasons active at the time in producing an opinion for its completion besides the protection of an exposed frontier. There was a vast unpeopled territory lying between the Missouri and Sacramento Rivers which was practically worthless without the facilities afforded by a railroad for the transportation of persons and property. With its construction, the agricultural and mineral resources of this territory could be developed, settlements made where settlements were possible, and thereby the wealth and power of the United States largely increased; and there was also the pressing want, in time of peace even, of an improved and cheaper method for the transportation of the mails, and of supplies for the army and the Indians.

"It was in the presence of these facts that Congress undertook to deal with the subject of this railroad. The difficulties in the way of building it were great, and by many intelligent persons considered insurmountable. * * * But the primary object of the government was to advance its own interests, and it endeavored to engage individual co-operation as a means to an end,—the securing a road which could be used for its own purposes." See also United States v. D. & R.G. Ry. Co., 150 U.S. 1; Winona & St. Peter R.R. Co. v. Barney, 113 U.S. 618.

did not consider these grants as bounties or gratuities be-
27 stowed upon the railroads but a means of inducing capital to construct railroads, under the most hazardous conditions, for the benefit of the nation. The grants were in the nature of proposals which the company could accept or reject. Nadeau v. Union Pacific R.R. Co., 253 U.S. 442; Burke v. Southern Pacific R.R. Co., 234 U.S. 669, 679. The inclusion of the right of way grant was an important part of the proposal and the inducement. Railroad v. Baldwin, supra.

To accomplish this national need, Congress adopted a policy of granting a right of way to railroads, and in addition the fee title to large areas of non-mineral lands lying on either side of a right of way. This policy came to an end in 1871.

It is urged that the cases hereinabove cited are not authority here because the United States was not a party and the right to minerals underlying rights of way was not being considered. This is true, but in the Great Northern Ry. Co. v. United States case, 315 U.S. 262, the United States was a party and the precise question under consideration was the right to the minerals underlying the right of way of Great Northern. The rights in that case were acquired under the general Right of Way Statute. (Act of March 3, 1875, 18 Stat. 482, 43 U.S.C.A. Sec. 934). The court carefully analyzed the "limited fee" cases and the Acts from which they arose, and held that under the 1875 Act, the railroad had only an easement in the right of way grant and was not entitled to the underlying minerals.

This result was reached not by overruling, or even criticizing
28 the former cases, but by distinguishing the grants[3] and concluding that the 1875 Act was "a product of the sharp change in congressional policy with respect to railroad grants after 1871. * * *" The court stated that the former cases construed land grant acts before the shift in congressional policy occurred in 1871, therefore were "not controlling here." The court observed that "When Congress made outright grants to a railroad of alternate sections of public lands along the right of way, there is little reason to suppose that it intended to give only an easement of the right of way granted in the same act." It is significant that in speaking of Rio Grande Western Ry. Co. v. Stringham, 239 U.S. 44, which held that

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[3] Section 4 required the location of each right of way to be noted on the land plats in the local land offices and "thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way." The court reasoned that the reserved right to convey the lands subject to the right of way grant was wholly inconsistent with the grant of a fee. There was no such provision in any of the prior acts granting right of way.

a railroad acquiring a right of way under the 1875 Act had a limited fee thereto, the court said:

> "The conclusion that the railroad was the owner of a 'limited fee' was based on cases arising under the land grant acts passed prior to 1871, and it does not appear that Congress' change of policy after 1871 was brought to the Court's attention. That
> 29 conclusion is inconsistent with the language of the Act, its legislative history, its early administrative interpretation and the construction placed on it by Congress in subsequent legislation. We therefore do not regard it as controlling. Statements in Choctaw, O. & G. R. Co. v. Mackey, 256 U.S. 531, and Noble v. Oklahoma City, 297 U.S. 481, that the 1875 Act conveyed a limited fee are dicta based on the Stringham case, and entitled to no more weight than the statements in that case. * * *"

It appears to us that the language of the Great Northern case is such that no other conclusion can be reached than that had the court been considering right of way grants made prior to 1871, it would have followed the "limited fee" cases and held that such title carried with it the right to remove the minerals.

The effect of the Great Northern case was discussed in United States v. Illinois Central R. Co., 89 F.Supp. 17, 23, (affirmed 7 Cir., 187 F.2d 374). In a well-considered opinion, it was held that "on the authority of the Northern Pacific case," the Illinois Central, under a grant prior to 1871, acquired a limited fee to the right of way lands which would entitle it to remove the minerals underlying the surface. We think the reasoning of that case is applicable here.[4]

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[4] In speaking of the effect of the Great Northern case, the court said at page 21:

"In the same opinion (the Great Northern opinion) the court distinguishes between the periods in the legislative and economic history of the United States from 1850 to 1871 and the period following 1871 in relation to the grants of lands from public domain to encourage the building of railroads and the Congressional attitude toward such grants. It points out that the period beginning in 1850 was characterized by a Congressional policy of subsidizing railroad construction by lavish grants from the public domain of which the Illinois Central Grant here in question, together with the Union Pacific Grant of July 1, 1862, Chap. 120, 12 Stat. at L. 489; the Amended Union Pacific Grant, Act of July 2, 1864, Chap. 216, 13 Stat. at L. 356; and the Northern Pacific Grant, Act of July

30 Generally the terms "limited", "determinable", "qualified", or "base" fee, as applied to the title of real estate, are used synonomously. Because of the possibility that it may endure forever, the owner of such an estate, so long as it exists, even though title may revert upon the happening of a condition, has the same rights as an owner in fee simple and may remove underlying minerals. 19 Am. Jur., Estates, Secs. 28, 30, 31; 31 C.J.S., Estates, Secs. 9, 10; Restatement of Property, Sec. 193, Comment (h); United States v. Illinois Central R. Co., supra; Frensley v. White, 208 Okl. 209, 254 P.2d 982; Davis v. Skipper, 125 Tex. 364, 83 S.W. 2d 318; Johnson Irrigation Co. v. Ivory, 46 Wyo. 221, 24 P.2d 1053, 126 F.Supp. 646.

The United States urges with special emphasis that the record illustrates that it was the policy of the United States, even during the period prior to 1871, to reserve the minerals in lands conveyed.

31 We cannot accede to the correctness of this proposition. It assumes that a policy of retention of the full title to mineral lands is the same as a policy of conveying the fee and reserving the mineral rights. The governmental policy in effect at the time of the Union Pacific grant, was that a grant or conveyance by the United States carried with it the full title, including minerals. Clearly the Act of July 2, 1862 excludes mineral lands from the grant. As stated in Burke v. Southern Pacific R.R. Co. 234 U.S. 669 this "was not a mere reservation of minerals, but an exclusion of mineral lands." See also Terry v. Midwest Refining Co., 10 Cir., 64 F.2d 428, 434. The railroad company could not obtain any title to the mineral lands, if known at the time patent issued, but if, after title passed, it developed that the lands were mineral, the United States had no claim. The passing of title by patent or grant was a determination of the non-mineral character of the land. Burke v. Southern Pacific R.R. Co., supra; Barden v. Northern Pacific R.R. Co., 154 U.S. 288. The exclusion of mineral lands was not confined to the railroad grants but to the homestead and other laws permitting the acquisition of public lands. Burke v. Southern Pacific R.R. Co., supra. The policy of conveying the fee and reserving minerals to the United States was not fully developed until the passage of the Stockraising Homestead Law in 1916, 43

2, 1864, Chap 217, 13 Stat. at L. 365, are referred to as being typical of the period. . . ."

(P. 23) "On authority of the Northern Pacific case it must be held that the defendant by its deed from the State of Illinois given pursuant to said grant in the Act of 1850, received and holds a limited fee in its right of way subject to an implied condition of reverter in the event it ceases to use or retain the right of way for the purpose for which it was granted."

U.S.C.A. 291, et seq., and the Leasing Act of 1920, 30 U.S.C.A. 181, et seq. We conclude that the Union Pacific, by the terms of the grant, received a limited fee title to its right of way and is
32 entitled to remove the underground minerals.

Affirmed.

33 In United States Court of Appeals

JUDGMENT.—February 24, 1956

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Wyoming and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed.

In United States Court of Appeals

CLERK'S NOTE RE MANDATE

By order of April 2, 1956, the mandate was stayed to April 29, 1956.

On May 2, 1956, the mandate of the United States Court of Appeals, in accordance with the opinion and judgment of said court, was issued to the United States District Court.

34 Clerk's Certificate to foregoing transcript omitted in printing.

35 Supreme Court of the United States

ORDER ALLOWING CERTIORARI. Filed October 8, 1956

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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OCTOBER TERM, 1955

No. —

UNITED STATES OF AMERICA, PETITIONER

v.

UNION PACIFIC RAILROAD COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of the United States of America, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled case on February 24, 1956.

OPINIONS BELOW

The opinion of the district court (R. 8-12) is reported at 126 F. Supp. 646. The opinion of the court of appeals (Appendix A, *infra*, pp. 16-25) is reported at 230 F. 2d 690.

JURISDICTION

The judgment of the court of appeals (Appendix A, *infra*, p. 26) was entered on February 24, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the grant by the United States to respondent in 1862 of "the right of way through the public lands * * * for the construction of said railroad and telegraph line * * *" conveyed the title to oil and gas deposits underlying the right of way so that respondent may remove or dispose of such deposits.

STATUTE INVOLVED

Sections 2 and 3 of the Act of July 1, 1862, 12 Stat. 489, 491-492, read as follows:

> SEC. 2. And be it further enacted, That the right of way through the public lands be, and the same is hereby, granted to said company for the construction of said railroad and telegraph line; and the right, power, and authority is hereby given to said company to take from the public lands adjacent to the line of said road, earth, stone, timber, and other materials for the construction thereof; said right of way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad where it may pass over the public lands, including all necessary grounds for stations, buildings, workshops, and depots, machine shops, switches, side tracks, turntables, and water stations. The United States shall extinguish as rapidly as may be the Indian titles to all lands falling under the operation of this act and required for the said right of way and grants hereinafter made.

SEC. 3. *And be it further enacted,* That there be, and is hereby, granted to the said company, for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores thereon, every alternate section of public land, designated by odd numbers, to the amount of five alternate sections per mile on each side of said railroad, on the line thereof, and within the limits of ten miles on each side of said road, not sold, reserved, or otherwise disposed of by the United States, and to which a preemption or homestead claim may not have attached, at the time the line of said road is definitely fixed: *Provided,* That all mineral lands shall be excepted from the operation of this act; but where the same shall contain timber, the timber thereon is hereby granted to said company. And all such lands, so granted by this section, which shall not be sold or disposed of by said company within three years after the entire road shall have been completed, shall be subject to settlement and preëmption, like other lands, at a price not exceeding one dollar and twenty-five cents per acre, to be paid to said company.

STATEMENT

This action was instituted by the United States to restrain respondent railroad company from conducting drilling operations for the discovery and

removal of oil and gas underlying that portion of its right of way which traverses certain lands in the State of Wyoming, and to quiet title in the United States to such mineral deposits. The facts are not in dispute and were stipulated (R. 5-8).

Pursuant to the general policy of encouraging the construction of railroads, the United States, by the Act of July 1, 1862, 12 Stat. 489, authorized the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean. Section 2 of the Act (12 Stat. 491-492, *supra*, p. 2) provided that "the right of way through the public lands be, and the same is hereby, granted to [respondent's predecessor in title] for the construction of said railroad and telegraph line." The right of way extended for two hundred feet on each side of the railroad when located. By Section 3 there were also granted in fee five alternate sections per mile within a belt of ten miles on each side of the road (*supra*, p. 3) "for the purpose of aiding in the construction of said railroad and telegraph line," but "all mineral lands" were expressly excepted from the Act. It was further provided as to this latter grant that such so-called "place" lands, if not sold or disposed of by the grantee within three years after completion of the entire road, should be subject to settlement and pre-emption, like other lands, and that the purchase price be paid to the grantee company.[1]

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[1] The 1862 Act was amended by the Act of July 2, 1864, 13 Stat. 356, 358, in respects which do not affect the question

It was stipulated and accordingly found as a fact that respondent and its predecessor have complied in all respects with the requirements of the Act granting the right of way, have built the railroad and telegraph line, and have at all times been using the right of way for the purposes set out in the Act of July 1, 1862, and that no portion of the right of way has been abandoned (Stip., par. 5, R. 5-6; Fdg. 5, R. 13).

It was further stipulated and found that the subject of this litigation is "The nature of the title to and the parties' interest in" that portion of the right of way traversing the N½ NW¼ of Sec. 24, T. 13 N., R. 68 W., 6th P.M., in the State of Wyoming, and that, other than the right of way, the title to the minerals in the above-described tract is in the United States (Stip., par. 10, R. 7; Fdg. 6, R. 13). It was also found by the District Court that respondent's proposed drilling operations and the removal, use and disposal and subsurface oil and other minerals will in no way interfere with the use of the right of way for railroad and telegraph purposes (Fdg. 8, R. 13-14).

In addition to its findings of fact, the District Court filed a memorandum opinion (R. 8-12) and conclusions of law (R. 14-15). In summary, the

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here presented. Section 3 was amended to increase the outright grant of sections to ten sections per mile instead of five on each side of the road, and to increase the belt on each side from which those sections could be selected to twenty miles instead of ten. It was further provided that "mineral land," as used in the 1862 Act, "shall not be construed to include coal and iron land."

court held that the railroad acquired a "limited fee" in the right of way, that the United States neither reserved nor excepted oil, gas, and other minerals beneath the right of way, and that the company could use the right of way for any purpose which did not interfere with continued operations of the railroad, and hence could drill for and remove subsurface oil and gas. The Court of Appeals, on substantially the same theory, affirmed.

REASONS FOR GRANTING THE WRIT

1. The opinions of both courts below build upon the same primary foundation for their conclusion that respondent owns the oil and gas underlying the right of way. Both courts rest on a line of decisions of this Court holding, in effect, that grants such as is here involved vested in the grantee railroad company a "base", "qualified", or "limited fee". Applying the technicalities of private real estate law ordinarily applicable to an estate so labeled, the courts below conclude that the only restriction upon the grant is a requirement of continued use for operation of the road, and hence that respondent necessarily owns and can use the underlying minerals.

Seven such decisions are cited by the Court of Appeals (App. A., *infra*, p. 19), of which the leading case is *Northern Pacific Ry* v. *Townsend*, 190 U.S. 267. But in only one of those cases was the United States a party, and in none was any question of title to or use of underlying minerals

in focus.[2] The District Court frankly acknowledged that the issue here "heads into virgin legal territory" and that "there are no cases which form a precedent as being on all fours with the case at bar" (R. 9). Likewise, the Court of Appeals recognizes (App. A, *infra*, p. 21) that in the "limited fee" decisions cited by it "the United States was not a party and the right to minerals underlying rights of way was not being considered."

That court, however, erroneously justifies its reliance on the "limited fee" cases by the decision of this Court in *Great Northern Ry. Co.* v. *United States*, 315 U.S. 262 (App. A, *infra*, pp. 21-23). But *Great Northern*, in which the government prevailed as to a later grant of a right of way, certainly does not warrant the conclusion that "had the court [in the *Great Northern* case] been considering right of way grants made prior to 1871, it would have followed the 'limited fee' cases and held that such title carried with it the right to remove the minerals" (App. A, *infra*, p. 23). There, this Court passed upon a grant under the General Right of Way Act of March 3, 1875, 18 Stat. 482, and a major difference between grants authorized by that Act and the earlier land grant statutes was that only a grant of "the right of way" was authorized,

[2] The case of *Clairmont* v. *United States*, 225 U.S. 551, the only case cited in which the Government was a party, involved only the question of whether a specific railroad right of way over lands formerly part of an Indian reservation was "Indian country" within the meaning of federal criminal law relating to introduction of liquor.

there being no grant of "place" lands. In holding that the Great Northern acquired an easement only, the Court relied upon a new policy of giving only rights of way, beginning in 1871 and embodied in general law in the 1875 Act. The Court distinguished and laid aside the "limited fee" cases on the ground that the grants in such cases antedated this new policy. For that reason it did not reach the question of the bearing, if any, of these "limited fee" decisions on the issue of the federal right to minerals—an issue which the Court of Appeals for the Ninth Circuit had held (in its opinion in the *Great Northern* case) was not foreclosed by the "limited fee" cases. *MacDonald* v. *United States*, 119 F.2d 821, 824, affirmed, 315 U.S. 262. That this Court expressly held open this question is put beyond doubt by the statement (315 U.S. at 278) that "none of the ["limited fee"] cases involved the problem of rights to subsurface oil and minerals."

It is plain, therefore, that the issue we present has never been determined by the Court, and that it is now open for authoritative determination.

2. Putting aside the "limited fee" decisions, we believe that the statute cannot properly be construed to grant the underlying oil and gas to respondent.[3] The grant "is to be liberally construed

[3] The Government, in view of the time which has elapsed, does not suggest that the "limited fee" decisions be overruled. But this Court has never stated to what extent the "fee" is limited, and we urge that these decisions be limited to their facts. A construction that the respondent acquired a limited

to carry out its purposes" but "nothing passes but what is conveyed in clear and explicit language." *Great Northern Ry. Co.* v. *United States, supra,* 315 U.S. 262, 272. The purpose of the right of way grant was "for the construction of" a railroad. On no theory can ownership of subsurface oil or gas be regarded as within such purposes, nor does either court below so consider it.[4]

Moreover, the grant is to be construed in the light of the history of the times when it was passed and of the federal policy then in effect. *Great Northern Ry. Co.* v. *United States, supra,* 315 U. S. 262 273. In *Great Northern* this Court based its decision on a change of policy whereby the Government ceased making land grants and substituted grants of a right of way only, rejecting an argument based on the identity of language in the grant of right of way in the 1875 Act and the earlier "limited fee" grants. A still earlier change of federal policy in making grants of all kinds comes into play here. Beginning in 1849, Congress inaugurated a significant policy, at first local to California, of withholding *mineral* lands from disposition under general laws. *Mining Co.* v. *Consolidated Mining Co.,* 102 U.S. 167, 173-174. This policy was extended and between 1864 and 1873 Con-

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fee in the surface and so much of the sub-surface as is necessary "for the construction" of the road would, as we will show, serve every legitimate railroad purpose of respondent and give effect to the intent of Congress to retain mineral wealth in the United States.

[4] There has been no claim here or suggestion by the courts below that extraction of the oil and gas was in any way related to the "construction" of the railroad or even its operation.

gress, by a series of statutes, enacted a "special code" for disposal of mineral lands. *United States* v. *Sweet*, 245 U.S. 563, 571. In the two cases just cited, grants of land to California and Utah which did not in terms reserve mineral lands were nevertheless held not to include them. The same strong policy has continued in effect until the present time.[5]

It is clear that Congress had this policy in mind in 1862, when it made its grants to respondent, and that it intended to withhold any mineral wealth. Section 3 of the Act, as introduced, provided only that "all mineral lands shall be exempted from the operation of this *section*" (emphasis added), but this was broadened by amendment to exclude such lands from the operation *of this Act*. Cong. Globe, 37th Cong., 2d sess., pt. 3, p. 2756. And during debate the Congress was advised that "the mineral lands through which this road is to pass are already excepted in this bill from the lands granted to this company. They will still belong to the Government of the United States." (Cong. Globe, 37th Cong., 2d sess., pt. 2, pp. 1909-1910).[6] This Court has characterized the very mineral exception contained in the Union Pacific grant and others of that period as "expressive of the will of Congress that every grant of public lands, whether to a State or otherwise, should be taken as reserving

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[5] An extensive discussion of this special minerals policy is contained in *West Coast Exploration Co.* v. *McKay*, 213 F.2d 582 (C.A. D.C.), certiorari denied, 347 U.S. 989.

[6] See also pt. 3, p. 2756, where a similar assurance was again given.

and excluding mineral lands in the absence of an expressed purpose to include them. * * *" *United States* v. *Sweet*, 245 U.S. 563, 569.

Since Congress intended to withhold from the grantee all mineral wealth when it authorized grants of "place" lands in fee, it could not have intended a contrary result as to the right of way, which was granted "for the construction" of the road and in which the respondent was never to acquire the absolute fee. This understanding of the Congressional policy has been recognized in a long-continued and uniform administrative construction that, although a "base" fee was created in the right of way, title to minerals did not pass. The administrative rulings began in 1905, with *Missouri, Kansas and Texas Ry. Co.*, 33 L. D. 470, 471, 472. Also ignored by the court below is the Congressional understanding to the same effect. The Act of May 21, 1930, 46 Stat. 373, authorizing issuance of oil and gas leases, covers railroad rights of way "whether the same be a base fee or mere easement," and thus plainly applies to grants like respondent's.

The sole effort of the Court of Appeals to rebut this position is abortive. In stressing the difference between the Government's retaining of full title to mineral lands and its reserving the mineral rights in lands granted outright (App. A., *infra*, pp. 24-25), the court is in effect saying that minerals are reserved from the right of way grant only when expressly reserved—contrary to the special minerals policy to which we have referred. Secondly,

the circumstance that the railroad could, through ignorance of the true character of the lands, acquire fee title to lands in the "place" area which were actually mineral has no relevance to the right of way, because the right of way, unlike the "place" lands, is never conveyed absolutely. As *Burke* v. *Southern Pacific R. R. Co.*, 234 U.S. 669, cited by the Court of Appeals (App. A, *infra*, p. 25), makes clear, where mineral lands were acquired as "place" lands it was only because they were not known to be mineral at the time of grant, and passed to the railroad as non-mineral or agricultural lands. This does not establish that Congress intended to vest the company with mineral wealth, but merely that overriding considerations of availability and marketability—to permit easy sale in order to provide funds for the construction of the road—required that a conclusive administrative determination of non-mineralty be made as of a specified date. No such situation arises with respect to the right of way which was never to be sold or transferred, and there would therefore be no occasion for a conclusive determination of mineralty. Moreover, lands which happened to contain minerals could not be totally excepted from the right of way which had to follow a reasonably straight line. Instead, the exception would be, not the total surface area, but rather, as we urge, the minerals in the land constituting the right of way. As a whole, therefore, the 1862 Act evidences an intent to withhold all mineral wealth, including that in the right of way, and the respondent can

point to nothing in the statute qualifying that purpose.

The Court of Appeals also relied (App. A, *infra*, p. 23) upon *United States* v. *Illinois Cent. R. Co.*, 187 F. 2d 374 (C.A. 7), but that case is plainly different. It involved a grant in 1850, when the fundamental mineral policy was not yet established, and the Illinois Central grant included no express exclusion of mineral lands or minerals such as is here involved, a fact relied upon by the District Court, which wrote the principal opinion in that case, 89 F. Supp., p. 24.

3. This case presents an important issue, upon the determination of which may turn the rights of the United States vis-a-vis not only the Union Pacific but other important railroads which acquired similar contemporary grants of right of way from the Government. The *Great Northern* case, *supra*, presented the question of ownership of oil and gas underlying the right of way grants authorized by the General Right of Way Act of 1875. This case presents the same issue under the earlier type grants of right of way contained in the land-grant acts. Moreover, the grant here involved was the first of a series of such grants occurring in a period which, as we have indicated, marked a new and significant mineral policy.

In Appendix B (*infra*, pp. 26-28) is a tabulation showing the approximate lengths of rights of way constructed by various railroads under numerous grants made during the period beginning with the 1862 grant to the Union Pacific

and ending with the year 1875, when the practice of making land grants was superseded by the General Right of Way Act. This compilation was based upon the best information available and is believed to be substantially accurate.[7] It appears therefrom that about ten thousand miles of railroad right of way were constructed under the instant and other grants made during this period. Certainly, most of the major western railroads were constructed under such grants. For example, the tabulation shows a right of way of 1,038.38 miles constructed by respondent company under the Act here in question (which, on the basis of a 400 foot right of way, is in excess of 50,000 acres), plus numerous connecting lines of substantial lengths constructed under the same act. Additionally, the Atchison, Topeka and Santa Fe constructed 469.35 miles of right of way under a grant contained in the Act of March 3, 1863, 12 Stat. 772, and another stretch of 636 miles under the Act of July 27, 1866, 14 Stat. 292; and the Northern Pacific Railroad (now "Railway") Company, under the Act of July 2, 1864, 13 Stat. 365, and the Joint Resolution of May 31, 1870, 16 Stat. 378, has constructed 2,037.81

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[7] For a tabulation of such grants see also Donaldson, *The Public Domain* (1884), pp. 756-762.

miles of right of way. These examples demonstrate that substantial rights of the Government and of the various major railroads will be affected by decision of the question here presented.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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MAY 1956.

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 5168—November Term, 1955

Appeal from the United States District Court for the District of Wyoming

(Filed February 24, 1956)

Fred W. Smith (Perry W. Morton, Assistant Attorney General; John F. Raper, Jr., United States Attorney, and Roger P. Marquis, Attorney, Department of Justice, were with him on the brief) for appellant;

William W. Clary, (Loomis, Lazear & Wilson, John U. Loomis; O'Melveny & Myers, Louis W. Myers; Warren M. Christopher and Charles H. McCrea were with him on the brief; Frank E. Barnett, W. R. Rouse, J. H. Anderson, and Henry M. Isaacs, of counsel) for appellee.

Before HUXMAN, MURRAH, and PICKETT, Circuit Judges.

PICKETT, Circuit Judge.

The United States brought this action for a determination of its right to oil and gas, or other minerals, underlying a portion of the Union Pacific right of way in Wyoming, and to restrain the Union Pacific Railroad Company from removing oil and gas from such lands. The single question presented is whether the right of way grant in Section 2 of the Act of July 1, 1862, 12 Stat. 489, 491,

conveyed to the predecessor of the Union Pacific such title as to entitle it to develop and take the underlying minerals therefrom.[1] On stipulated facts, the trial court found that the Act granted a fee simple determinable, sometimes called a base, qualified or limited fee title in the right of way, subject only to an implied condition of reverter in the event the company ceased to use the right of way for the purpose of the Act, which title carried with it the right to remove the subsurface oil and gas, and other minerals. 126 F. Supp. 646. A judgment was entered dismissing the action.

The aforementioned Section 2 of the Act of July 1, 1862, reads as follows:

> "Sec. 2. *And be it further enacted,* That the right of way through the public lands be, and the same is hereby, granted to said com-

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[1] A stipulation of the parties states their claims as follows: "6. Defendant claims that under the Acts of Congress set forth in Paragraph 3 hereof, it received a present grant in fee simple determinable (sometimes called a base, qualified or limited fee) of the lands contained within the right of way and acquired the sole and unrestricted right to drill for, remove, use, and dispose of the subsurface oil, gas, and other minerals underlying the right of way. Plaintiff claims that the defendant acquired the right to use the right of way only for railroad and telegraph purposes, that defendant acquired no right to use any portion of the right of way to drill for or remove subsurface oil and minerals, that the oil, gas, and mineral deposits underlying the right of way remain the property of the United States and subject to its control and disposition, and that plaintiff is entitled to the relief prayed for. The purpose of this case is to adjudicate those claims and determine the relative rights of the United States and the defendant in the oil, gas, and other minerals underlying the right of way."

pany for the construction of said railroad and telegraph line; and the right, power, and authority is hereby given to said company to take from the public lands adjacent to the line of said road, earth, stone, timber, and other materials for the construction thereof; said right of way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad where it may pass over the public lands, including all necessary grounds for stations, buildings, workshops, and depots, machine shops, switches, side tracks, turntables, and water stations. The United States shall extinguish as rapidly as may be the Indian titles to all lands falling under the operation of this Act and required for the said right of way and grants hereinafter made."

Section 3 grants to the predecessor of the Union Pacific alternate sections over a limited area along the right of way. It provides that "all mineral lands shall be excepted from the operation of the Act." Section 4 fixes the time when patents shall issue for the alternate sections. It is stipulated that the Act has been complied with and it is not contended that the drilling for oil and gas on the right of way will interfere with the operations of the railroad or the use of the right of way for railroad purposes.

The question of the extent of the estate conveyed in the right of way grants under this Act, and similar Acts during the same period, has been before

the courts on numerous occasions. As to those grants, it has been held without exception that the railroad received more than a mere easement over the land. The substance of the decisions is that considering the time and the circumstances under which these grants were made, Congress intended to convey a limited fee with an implied condition of reverter to the United States in the event the company ceased to use or retain the land for the purposes for which it was granted. The most important of these are Railroad Co. v. Baldwin, 103 U.S. 426; Missouri, Kansas & Texas Ry. Co. v. Roberts, 152 U.S. 114; New Mexico v. United States Trust Co., 172 U.S. 171; Northern Pacific Ry. v. Townsend, 190 U.S. 267; Clairmont v. United States, 225 U.S. 551; Union Pacific R.R. Co. v. Laramie Stock Yards Co., 231 U.S. 190; Missouri, Kansas & Texas Ry. Co. v. Oklahoma, 271 U.S. 303. These cases illustrate that the Supreme Court had a clear understanding of the accepted meaning of the terms "easement", "right of way", "limited fee", and "fee title". The grants considered in the foregoing cases were all made during the period 1850 to 1871. During this period it was considered of utmost national importance that a railroad be constructed to the west coast of the United States and to other areas of the west and northwest. Indeed, the Supreme Court, in referring to the Union Pacific grant, said in United States v. Union Pacific R.R. Co. 91 U.S. 72, 79, that "many of the provisions in the original Act of 1862 are outside of the usual course of legislative action concerning grants to railroads, and cannot be properly con-

strued without reference to the circumstances which existed when it was passed."[2] At the time Congress did not consider these grants as bounties or gratuities bestowed upon the railroads but a means of inducing capital to construct railroads, under the most hazardous conditions, for the benefit of the nation. The grants were in the nature of proposals which the company could accept or re-

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[2] These circumstances, the court described in part as follows: "The war of the rebellion was in progress; and, owing to complications with England, the country had become alarmed for the safety of our Pacific possessions. * * * It is true, the threatened danger was happily averted; but wisdom pointed out the necessity of making suitable provisions for the future. This could be done in no better way than by the construction of a railroad across the continent. * * *

"Although this road was a military necessity, there were other reasons active at the time in producing an opinion for its completion besides the protection of an exposed frontier. There was a vast unpeopled territory lying between the Missouri and Sacramento Rivers which was practically worthless without the facilities afforded by a railroad for the transportation of persons and property. With its construction, the agricultural and mineral resources of this territory could be developed, settlements made where settlements were possible, and thereby the wealth and power of the United States largely increased; and there was also the pressing want, in time of peace even, of an improved and cheaper method for the transportation of the mails, and of supplies for the army and the Indians.

"It was in the presence of these facts that Congress undertook to deal with the subject of this railroad. The difficulties in the way of building it were great, and by many intelligent persons considered insurmountable. * * * But the primary object of the government was to advance its own interests, and it endeavored to engage individual co-operation as a means to an end—the securing a road which could be used for its own purposes." See also United States v. D. & R.G. Ry. Co. 150 U.S. 1; Winona & St. Peter R.R. Co. v. Barney, 113 U.S. 618.

ject. Nadeau v. Union Pacific R.R. Co. 253 U.S. 442; Burke v. Southern Pacific R.R. Co. 234 U.S. 669, 679. The inclusion of the right of way grant was an important part of the proposal and the inducement. Railroad v. Baldwin, supra.

To accomplish this national need, Congress adopted a policy of granting a right of way to railroads, and in addition the fee title to large areas of non-mineral lands lying on either side of a right of way. This policy came to an end in 1871.

It is urged that the cases hereinabove cited are not authority here because the United States was not a party and the right to minerals underlying rights of way was not being considered. This is true, but in the Great Northern Ry. Co. v. United States case, 315 U.S. 262, the United States was a party and the precise question under consideration was the right to the minerals underlying the right of way of Great Northern. The rights in that case were acquired under the general Right of Way Statute. (Act of March 3, 1875, 18 Stat. 482, 43 U.S.C.A. Sec. 934). The court carefully analyzed the "limited fee" cases and the Acts from which they arose, and held that under the 1875 Act, the railroad had only an easement in the right of way grant and was not entitled to the underlying minerals. This result was reached not by overruling, or even criticizing the former cases, but by distinguishing the grants [3] and concluding that the

[3] Section 4 required the location of each right of way to be noted on the land plats in the local land offices and "thereafter all such lands over which such right of way shall pass shall be

1875 Act was "a product of the sharp change in congressional policy with respect to railroad grants after 1871. * * *" The court stated that the former cases construed land grant acts before the shift in congressional policy occurred in 1871, therefore were "not controlling here." The court observed that "When Congress made outright grants to a railroad of alternate sections of public lands along the right of way, there is little reason to suppose that it intended to give only an easement of the right of way granted in the same act." It is significant that in speaking of Rio Grande Western Ry. Co. v. Stringham, 239 U.S. 44, which held that a railroad acquiring a right of way under the 1875 Act had a limited fee thereto, the court said:

> "The conclusion that the railroad was the owner of a 'limited fee' was based on cases arising under the land grant acts passed prior to 1871, and it does not appear that Congress' change of policy after 1871 was brought to the Court's attention. That conclusion is inconsistent with the language of the Act, its legislative history, its early administrative interpretation and the construction placed on it by Congress in subsequent legislation. We therefore do not regard it as controlling. Statements in Choctaw, O. & G. R. Co. v.

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disposed of subject to such right of way." The court reasoned that the reserved right to convey the lands subject to the right of way grant was wholly inconsistent with the grant of a fee. There was no such provision in any of the prior acts granting right of way.

> Mackey, 256 U.S. 531, and Noble v. Oklahoma City, 297 U.S. 481, that the 1875 Act conveyed a limited fee are dicta based on the Stringham case, and entitled to no more weight than the statements in that case. * * *"

It appears to us that the language of the Great Northern case is such that no other conclusion can be reached than that had the court been considering right of way grants made prior to 1871, it would have followed the "limited fee" cases and held that such title carried with it the right to remove the minerals.

The effect of the Great Northern case was discussed in United States v. Illinois Central R. Co., 89 F. Supp. 17, 23, (affirmed 7 Cir., 187 F. 2d 374). In a well-considered opinion, it was held that "on the authority of the Great Northern case," the Illinois Central, under a grant prior to 1871, acquired a limited fee to the right of way lands which would entitle it to remove the minerals underlying the surface. We think the reasoning of that case is applicable here.[4]

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[4] In speaking of the effect of the Great Northern case, the court said at page 21:

"In the same opinion (the Great Northern opinion) the court distinguishes between the periods in the legislative and economic history of the United States from 1850 to 1871 and the period following 1871 in relation to the grants of lands from public domain to encourage the building of railroads and the Congressional attitude toward such grants. It points out that the period beginning in 1850 was characterized by a Congressional policy of subsidizing railroad construction by lavish grants from the public domain of which the Illinois Central Grant here in question, together with the Union Pacific Grant

Generally the terms "limited", "determinable", "qualified", or "base" fee, as applied to the title of real estate, are used synonomyously [sic]. Because of the possibility that it may endure forever, the owner of such an estate, so long as it exists, even though title may revert upon the happening of a condition, has the same rights as an owner in fee simple and may remove underlying minerals. 19 Am. Jur., Estates, Secs. 28, 30, 31; 31 C.J.S., Estates, Secs. 9, 10; Restatement of Property, Sec. 193, Comment (h); United States v. Illinois Central R. Co., supra; Frensley v. White, 208 Okl. 209, 254 P. 2d 982; Davis v. Skipper, 125 Tex. 364, 83 S.W. 2d 318; Johnson Irrigation Co. v. Ivory, 46 Wyo. 221, 24 P. 2d 1053, 126 F. Supp. 646.

The United States urges with special emphasis that the record illustrates that it was the policy of the United States, even during the period prior to 1871, to reserve the minerals in lands conveyed. We cannot accede to the correctness of this proposition. It assumes that a policy of retention of the full title to mineral lands is the same as a policy of conveying the fee and reserving the mineral

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of July 1, 1862, Chap. 120, 12 Stat. at L. 489; the Amended Union Pacific Grant, Act of July 2, 1864, Chap. 216, 13 Stat. at L. 356; and the Northern Pacific Grant, Act of July 2, 1864, Chap. 217, 13 Stat. at L. 365, are referred to as being typical of the period. . . ."

(P. 23) "On authority of the Northern Pacific case it must be held that the defendant by its deed from the State of Illinois given pursuant to said grant in the Act of 1850, received and holds a limited fee in its right of way subject to an implied condition of reverter in the event it ceases to use or retain the right of way for the purpose for which it was granted. . . ."

rights. The governmental policy in effect at the time of the Union Pacific grant, was that a grant or conveyance by the United States carried with it the full title, including minerals. Clearly the Act of July 2, 1862 excludes mineral lands from the grant. As stated in Burke v. Southern Pacific R.R. Co., 234 U.S. 669, this "was not a mere reservation of minerals, but an exclusion of mineral lands." See also Terry v. Midwest Refining Co., 10 Cir., 64 F. 2d 428, 434. The railroad company could not obtain any title to the mineral lands, if known at the time patent issued, but if, after title passed, it developed that the lands were mineral, the United States had no claim. The passing of title by patent or grant was a determination of the non-mineral character of the land. Burke v. Southern Pacific R. R. Co., supra; Barden v. Northern Pacific R. R. Co. 154 U.S. 288. The exclusion of mineral lands was not confined to the railroad grants but to the homestead and other laws permitting the acquisition of public lands. Burke v. Southern Pacific R. R. Co., supra. The policy of conveying the fee and reserving minerals to the United States was not fully developed until the passage of the Stockraising Homestead Law in 1916, 43 U.S.C.A. 291, et seq., and the Leasing Act of 1920, 30 U.S.C.A. 181 et seq. We conclude that the Union Pacific, by the terms of the grant, received a limited fee title to its right of way and is entitled to remove the underground minerals.

Affirmed.

JUDGMENT

Sixty-fifth Day, November Term, Friday, February 24th, 1956.

Before Honorable Walter A. Huxman, Honorable Alfred P. Murrah and Honorable John C. Pickett, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Wyoming and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed.

APPENDIX B

The following is a tabulation of the miles of railroad constructed along rights of way granted by right of way provisions included in acts of Congress making grants of land in aid of railroad construction. The tabulation starts with the Act of July 1, 1862, as amended by the Act of July 2, 1864.

Acts of July 1, 1862 (12 Stat. 489) and July 2, 1864 (13 Stat. 356)	
Union Pacific Railroad Company	1038.68 miles
From the Missouri River at Omaha, Nebr., to a junction with the Central Pacific Railroad in the NW-NE¼ sec. 1-T. 6 N., R. 2 W., Utah, 5.11 miles north of Ogden.	
Denver Pacific Railway Co	106.00 miles
From Denver, Colorado, to junction with Union Pacific Ry. Co., at Cheyenne, Wyoming.	
Kansas Pacific Railway Co	638.6 miles
From Missouri State line, near Kansas City to Denver, Colorado.	
Western Pacific Railroad Co	123.16 miles
From Sacramento to San Jose, California.	
Central Pacific Railroad Co	737.5 miles

From Sacramento, Cal., to junction with Union Pacific Ry. Co. in Sec. T. 6 N., R. 2 W., near Ogden, Utah.
Hannibal & St. Joseph R.R. Co. ..... 100.00 miles.
From Atchison, Kansas to 100th mile-post near Waterville, Kansas.
Union Pacific R.R. Co. ..... 101.77 miles
From Sioux City, Iowa, to Fremont, Nebr.
Burlington & Missouri R.R. Co. ..... 190.75 miles
From Plattsmouth to Kearny Junction, Nebr.

Act of March 3, 1863 (12 Stat. 772)

Leavenworth, Lawrence and Galveston R.R. Co. ..... 142.80 miles
From Lawrence, Kansas, to the southern boundary of Kansas.
Atchison, Topeka and Santa Fe R.R. Co. ..... 469.35 miles
From Atchison, Kansas, to western boundary of State near town of Coolidge.
Missouri, Kansas and Texas Ry. Co. ..... 180.50 miles
From Fort Riley to southern boundary of Kansas.

Act of July 1, 1864 (13 Stat. 339) and Act of July 26, 1866 (14 Stat. 289), and Act of July 25, 1866 (14 Stat. 236)

Missouri, Kansas and Texas Rwy. Co. ..... 155.35 miles
From southern boundary of Kansas through the Indian Territory to the Red River near Preston, Texas.

Act of May 5, 1864 (13 Stat. 66)

Wisconsin Railroad Co. ..... 257.00 miles
From Portage via Stevens' Point to Ashland, Wisconsin.

Act of May 12, 1864 (13 Stat. 72)

Sioux City and Saint Paul R.R. Co. ..... 56.25 miles
From the Minnesota boundary to a connection with Iowa Falls and Sioux City Ry. (Illinois Central).

Act of May 12, 1864 (13 Stat. 72)

Chicago, Milwaukee and Saint Paul Ry. Co. ..... 251.00 miles
From South McGregor, via Calmar to a connection with the Sioux City and Saint Paul R.R. at Sheldon, Obrien County, Iowa.

Act of July 2, 1864 (13 Stat. 365), and Joint Resolution of May 31, 1870 (16 Stat. 378)

Northern Pacific Railroad (now Railway) Company .. 2037.81 miles

Act of July 4, 1866 (14 Stat. 87)

Southern Minnesota Railroad Company ..... 279.37 miles
From Houston to Winnebago City to Airlie on western boundary of Minnesota. Owned and operated by Chicago, Milwaukee and Saint Paul Ry. Co.
Hastings and Dakota R.R. Co. ..... 202.10 miles
From Hastings to Ortonville on western boundary of State. Now Chicago, Milwaukee and Saint Paul Ry. Co.

Act of July 23, 1866 (14 Stat. 210)

Saint Joseph and Denver R.R. Co. ..... 226.00 miles
From Elwood, Kansas to junction with Burlington and Missouri River R.R. at Hastings, Nebr., owned and operated by Saint Joseph and Grand Island R.R. Co.

Act of July 25, 1866 (14 Stat. 239)	
California and Oregon R.R. Co.	304.00 miles
From junction with Central Pacific R.R. at Roseville, Calif., to junction with Oregon and California R.R. at Oregon State line.	
Oregon and California R.R. Co.	360.00 miles
From Portland, Oregon to junction with Calif. & Oregon R.R. at California State line.	
Act of July 27, 1866 (14 Stat. 292)	
Saint Louis and San Francisco R.R. Co.	89.00 miles
From Springfield, Missouri to Missouri State line (westwardly).	
Santa Pacific Railroad Co., operated by Atchison, Topeka and Santa Fe Ry. Co.	636.00 miles
From Isleta, N. Mex., to Colorado River.	
Southern Pacific Railroad Co.	495.52 miles
From San Jose, California to Needles on Colorado River.	
Act of May 4, 1870 (16 Stat. 94)	
Oregon and California R.R. Co.	47.50 miles
From Portland, Oregon, via Forest Grove to McMinnville, Oregon.	
Act of March 3, 1871 (16 Stat. 573)	
Southern Pacific R.R. Co.	346.97 miles
From Mojave, Cal. via Los Angeles to Colorado River at Yuma.	
Act of March 3, 1871 (16 Stat. 573)	
New Orleans Pacific R.R. Co.	260.00 miles
From White Castle to Shreveport, Louisiana.	
Total	9832.98 miles

In the Supreme Court of the United States

OCTOBER TERM, 1956

UNITED STATES OF AMERICA, PETITIONER

v.

UNION PACIFIC RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OCTOBER TERM, 1956

No. 97

UNITED STATES OF AMERICA, PETITIONER

v.

UNION PACIFIC RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Court of Appeals (R. 18–24) is reported at 230 F. 2d 690. The opinion of the District Court (R. 7–11) is reported at 126 F. Supp. 646.

JURISDICTION

The judgment of the Court of Appeals (R. 24) was entered on February 24, 1956. The petition for a writ of certiorari was filed on May 21, 1956, and was granted on October 8, 1956 (R. 24; 352 U. S. 818). The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the grant by the United States to respondent in 1862 of "the right of way through the public lands * * * for the construction of said railroad and telegraph line * * *" conveyed the title to oil and gas deposits underlying the right of way so that respondent may remove or dispose of such deposits.

STATUTE INVOLVED

Sections 2, 3 and 4 of the Act of July 1, 1862, 12 Stat. 489, 491–492, read as follows:

> SEC. 2. *And be it further enacted,* That the right of way through the public lands be, and the same is hereby, granted to said company for the construction of said railroad and telegraph line; and the right, power, and authority is hereby given to said company to take from the public lands adjacent to the line of said road, earth, stone, timber, and other materials for the construction thereof; said right of way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad where it may pass over the public lands, including all necessary grounds for stations, buildings, workshops, and depots, machine shops, switches, side tracks, turntables, and water stations. The United States shall extinguish as rapidly as may be the Indian titles to all lands falling under the operation of this act and required for the said right of way and grants hereinafter made.
>
> SEC. 3. *And be it further enacted,* That there be, and is hereby, granted to the said company, for the purpose of aiding in the construction of

said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores thereon, every alternate section of public land, designated by odd numbers, to the amount of five alternate sections per mile on each side of said railroad, on the line thereof, and within the limits of ten miles on each side of said road, not sold, reserved, or otherwise disposed of by the United States, and to which a preëmption or homestead claim may not have attached, at the time the line of said road is definitely fixed: *Provided,* That all mineral lands shall be excepted from the operation of this act; but where the same shall contain timber, the timber thereon is hereby granted to said company. And all such lands, so granted by this section, which shall not be sold or disposed of by said company within three years after the entire road shall have been completed, shall be subject to settlement and preëmption, like other lands, at a price not exceeding one dollar and twenty-five cents per acre, to be paid to said company.

SEC. 4. *And be it further enacted,* That whenever said company shall have completed forty consecutive miles of any portion of said railroad and telegraph line, ready for the service contemplated by this act, * * * the President of the United States shall appoint three commissioners to examine the same and report to him in relation thereto; and if it shall appear to him that forty consecutive miles of said railroad and telegraph line have been completed and equipped in all respects as required by this act, then, * * * patents shall issue conveying the right and title to said lands to said company * * *; to the amount aforesaid; * * *.

STATEMENT

This action was instituted by the United States to restrain the respondent railroad company from conducting drilling operations for the discovery and removal of oil and gas underlying that portion of the company's right of way which traverses the N½ NW¼, Section 24, T. 13 N., R. 68 W., in the State of Wyoming, and to quiet title in the United States to such mineral deposits. The material facts are not in dispute, and were stipulated by the parties (R. 5–7). They are as follows:

Pursuant to the general policy of encouraging the construction of railroads, the United States, by the Act of July 1, 1862, 12 Stat. 489, authorized the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean. Section 2 of the Act (12 Stat. 491–492, *supra*, p. 2) provided that a "right of way through the public lands be, and the same is hereby, granted to [respondent's predecessor in title] for the construction of said railroad and telegraph line." The right of way extended for two hundred feet on each side of the railroad when located. There were also granted by Section 3 (*supra*, pp. 2–3) in fee five alternate sections per mile within a belt of ten miles on each side of the road "for the purpose of aiding in the construction of said railroad and telegraph line," but "all mineral lands" were expressly excepted from the Act. It was further provided, as to this "place land" grant, that such lands, if not sold or disposed of by the grantee within three years after completion of the entire road, should be subject to

settlement and pre-emption, like other lands, and that the purchase price be paid to the grantee company.[1]

It was stipulated and accordingly found as a fact that respondent and its predecessor have complied in all respects with the requirements of the Act granting the right of way, have built the railroad and telegraph line, and have at all times been using the right of way for the purposes set out in the Act of July 1, 1862, and that no portion of the right of way has been abandoned (Stip., p. 5, R. 5; Fdg. 5, R. 12).

It was further stipulated and found that the subject of this litigation in the "nature of the title to and the parties' interest in" that portion of the right of way traversing the "N½ NW¼ of Sec. 24, T. 13 N., R. 68 W., 6th P. M., in the State of Wyoming," and that the title to the minerals in the above-described tract outside the right of way is in the United States (Stip., par. 10, R. 6; Fdg. 6; R. 12, 13). In addition, the District Court found that respondent's proposed drilling operations and the removal, use and disposal of subsurface oil and other minerals will in no way interfere with the use of the right of way for railroad and telegraph purposes (Fdg. 8, R. 13).

The District Court's memorandum opinion (R. 7–11) and its conclusions state that the 1862 Act granted

[1] The 1862 Act was amended by the Act of July 2, 1864, 13 Stat. 356, 358, in respects which do not affect the question here presented. Section 3 was amended to increase the outright grant of sections to 10 sections per mile instead of five on each side of the road, and to increase the belt on each side from which those sections could be selected to 20 miles instead of 10. It was further provided that "mineral land," as used in the 1862 Act, "shall not be construed to include coal and iron land."

to respondent "a fee simple determinable, sometimes called a base, qualified or limited fee" in the right of way and that this estate in the right of way is absolute and without restriction, except as to the implied condition of reverter, entitling the company to use it for any purpose which will not interfere with operation of the railroad, and to engage in mineral operations so long as they do not interfere with the primary purpose of the grant (Concls. 2, 5, R. 13, 14). Judgment in favor of respondent was entered by the District Court (R. 14–15), and the Court of Appeals, on the same theory, affirmed (R. 18–24).

SUMMARY OF ARGUMENT

I

A. The grant of a right of way in Section 2 of the 1862 Act "for the construction of" the railroad did not vest respondent with any interest in oil and gas deposits underlying the right of way. Congress undertook to supply two requisites to the establishment of the road, *i. e.*, (1) financial support in aid of construction and (2) a site and materials for the construction itself. The first objective was dealt with in Section 3 of the Act by the outright grant of lands in fee on each side of the right of way to be sold "in aid of construction," and in Section 5 providing for issuance of government bonds. The second objective, construction of the road itself, was the office of Section 2 granting (a) a right of way and (b) construction materials from adjacent lands, both grants being "for the construction" of the road. Under the settled rule of construction that "such grants must be con-

strued favorably to the Government and that nothing passes but what is conveyed in clear and explicit language—inferences being resolved not against but for the Government," the grant of materials from adjacent land was only "for purposes of railroad construction, not as a means of business or of profit" and created rights in such materials only to the extent they were needed and used in construction. *Caldwell* v. *United States*, 250 U. S. 14, 20–21. Similarly, the grant of a right of way, also expressly "for the construction of" the road, was a grant of right of way only for those construction purposes; it granted no interest in the right of way "as a means of business or profit", and so excluded any grant of a right in the underlying oil and gas (which have no connection at all with railroading).

B. The conclusion that respondent acquired no right or interest in underlying oil and gas, clearly supported by construction of the 1862 Act alone, is fortified and confirmed by a firm federal policy—initiated in 1849 and recognized in decisions of this Court as being in full force in 1862 when the grant to respondent was made—of conveying mineral lands and resources only by laws specially dealing with them. Grants made after this policy was in force, if silent on the subject of minerals, were held by this Court not to include mineral lands. *Mining Co.* v. *Consolidated Mining Co.*, 102 U. S. 167; *United States* v. *Sweet*, 245 U. S. 563. Moreover, the 1862 Act specifically evidences that policy since it contains an express exclusion in Section 3 of mineral lands "from

the operation of this act," and the legislative history of the bill which became the Act shows that this express reservation was deliberate and strongly suggests that it was the intention of Congress to withhold from respondent any interest in mineral lands or minerals.

The only answer of the Court of Appeals to the impact of this policy is based upon a technical differentiation between a reservation of mineral lands from a grant and a reservation of minerals from lands granted, relying on *Burke* v. *Southern Pacific R. R. Co.*, 234 U. S. 669. But that case dealt only with "place lands"—holding that the administrative determination of non-mineralty at the time of patenting was conclusive—and recognizes an exception to the "non-mineral" policy of Congress because of other overriding considerations, *i. e.*, speedy availability and maximum marketability of such "place lands." Those overriding considerations are irrelevant as to right of way lands which were not to be sold or patented but were to be retained by the railroad for the construction and operation of its road.

II

A. The main reliance of the Court of Appeals is on a line of older decisions in which this Court referred to the railroad's interest in the right of way, in grants similar to respondent's, as a "limited fee." But those cases concerned private parties and none involved the question of rights in the right of way as between the United States and its grantees; and of

course none involved the question of title to oil and gas underlying the right of way. They therefore do not preclude an independent examination of that question in the instant case where it comes before the Court for the first time.

Moreover, we do not question the actual holdings in those cases. The rights asserted by the claiming third parties, if sustained, would have impaired the use of the right of way for railway purposes which the Government had granted, and the presumption was therefore in favor of the railroads. The right here asserted by the Government does not involve any impairment of the grant to respondent for railway purposes, and any doubts are to be resolved in favor of the United States.

The Court of Appeals also erred in declaring that this Court's decision in *Great Northern Ry. Co.* v. *United States,* 315 U. S. 262, implied a recognition that the "limited fee" cases are dispositive of the question now before the Court. In *Great Northern* this Court (315 U. S. at p. 278) pointedly observed with regard to the "limited fee" cases that "None of the cases involved the problem of rights to subsurface oil and minerals," clearly intimating that those decisions do not foreclose a full examination of the question by this Court when, as here, it is squarely presented. And the Court of Appeals in its decision in *Great Northern* had flatly rejected that line of cases as authoritative on the question of ownership of minerals underlying rights of way. *MacDonald* v. *United States,* 119 F. 2d 821, 824 (C. A. 9). It is significant,

too, that in *Great Northern* this Court expressly held (p. 279) that where an examination of the statute, its legislative history, its administrative and legislative construction, all led to one conclusion, this Court would so hold despite a contrary view expressed in one of its previous decisions where such factors were not given due consideration.

The adverse decision in *United States* v. *Illinois Central R. Co.*, 89 F. Supp. 17 (E. D. Ill.), affirmed *per curiam*, 187 F. 2d 374 (C. A. 7), is erroneous because it fails to apply the proper rule of construction and is based upon a misapprehension of the scope of the "limited fee" decisions. In any event, it is clearly distinguishable since it involved a grant in 1850, when the mineral policy now relied upon by the United States had not matured, and the granting act contained no reservation on that subject. The lack of such a reservation was expressly relied on by the court in *Illinois Central* in deciding against the Government.

B. Finally, long and uniform administrative construction of grants such as is here involved, while not of course conclusive, is entitled to proper weight by the Court, as is a Congressional enactment in 1930 supporting and adopting such administrative interpretation. *Great Northern Ry. Co.* v. *United States*, 315 U. S. 262, 275, 276.

ARGUMENT

I

THE GRANT BY SECTION 2 OF THE ACT OF JULY 1, 1862, OF A "RIGHT OF WAY THROUGH THE PUBLIC LANDS * * * FOR THE CONSTRUCTION OF" A RAILROAD AND TELEGRAPH LINE DID NOT VEST IN THE GRANTEE COMPANY ANY TITLE OR OTHER INTEREST IN OIL, GAS, OR OTHER MINERALS UNDERLYING THE RIGHT OF WAY

A. SECTION 2 OF THE ACT OF JULY 1, 1862, STANDING ALONE, CONVEYED NO RIGHT OR INTEREST IN MINERALS UNDERLYING THE RIGHT OF WAY

Section 2 of the Act of July 1, 1862 (*supra*, p. 2) is the basic statutory provision granting the respondent its right of way; the section provided that a "right of way through the public lands be, and the same is hereby, granted to * * * [respondent's predecessor in title] for the construction of said railroad and telegraph line." The first problem is the meaning of this section, standing alone.

(*a*). In considering the question of whether any interest in subsurface minerals passed under this grant, two settled rules of construction of Government grants come into play. They were stated by this Court in *Great Northern Ry Co.* v. *United States*, 315 U. S. 262, 272 (where the Court had before it the same question of title to subsurface minerals in a right of way, but under a different statute (see *infra*, pp. 41–45)), as follows: The language granting the right of way "is to be liberally construed to carry out its purposes," but "nothing passes but what is conveyed in clear and explicit language." Super-

ficially, these rules of construction may appear incompatible, since the first permits of some construction by implication while the second rules out of the grant anything not expressly conveyed; they do not, however, actually clash. The first is operative in considering whether a surface use of the right of way is a use for the objective for which the grant of the right of way was given, *i. e.*, railroad construction purposes. This means that the courts will approach with liberality the issue of whether a particular activity is within the scope of a true "railroad" purpose. But when the question is as to what is clearly not a "railroad" use, the second rule applies, and the grantee must be able to point to language in the grant expressly authorizing such conversion or disposal, or expressly granting the asserted right.[2]

The line of demarcation was strikingly drawn by this Court in *Caldwell* v. *United States*, 250 U. S. 14. Involved there was the General Right of Way Act of March 3, 1875, 43 U. S. C. 934; in addition to rights of way through the public lands, there was a grant to the owner of a right of way of the right "to take, from the public lands adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad." The grantee cut down trees for the making of railroad

[2] See *Barden* v. *Northern Pacific Railroad*, 154 U. S. 288, 325–326; *Sioux City etc. Railroad* v. *United States*, 159 U. S. 349, 360; *Wisconsin Central Railroad* v. *United States*, 164 U. S. 190, 202; *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420, 545–546.

ties. The "tie slash" or tops of the trees remaining were sold by the United States and the railroad company's agents sued the Government in the Court of Claims for the value of the tie slash. The Court, affirming a judgment of dismissal, stated (250 U. S. at pp. 20–21):

> The contention of appellants encounters the rule that statutes granting privileges or relinquishing rights are to be strictly construed; or, to express the rule more directly, that *such grants must be construed favorably to the Government and that nothing passes but what is conveyed in clear and explicit language—inferences being resolved not against but for the Government.* * * *
>
> The rule, it seems to us, is particularly applicable. *There was a grant of timber* by the Act of March 3, 1875, not of trees, *but of timber for purposes of railroad construction, not as a means of business or of profit;* nor could it be made an element, as contended, of compensation to the agents employed to cut it. [Emphasis added.]

(*b*). Accordingly, respondent must show (1) that the extraction of subsurface minerals is a use of the right of way in contemplation of the purpose of the grant or (2), failing this, that there is an express provision in the grant passing title to such minerals to the railroad company. Respondent cannot meet either requirement.

(1). It is clear that the extraction of oil, gas, or other minerals is not a use of the land for the stated purpose of the grant of the right of way. The

removal of the subsurface minerals cannot be labeled a use of the right of way "for the construction of said railroad and telegraph line," the objective expressed in Section 2. Thus, in the *Great Northern case* (315 U. S. at p. 272), the Court, referring to the General Right of Way Act there involved, stated:

> * * * The Act was designed to permit the construction of railroads through the public lands and thus enhance their value and hasten their settlement. The achievement of that purpose does not compel a construction of the right of way grant as conveying a fee title to the land and the underlying minerals; * * *.

Although that case involved a grant under a different statute, the language we have quoted squarely applies to the present question. For it is equally true of the grant to the Union Pacific of a right of way "for the construction of said railroad and telegraph line" that the grant does not include the right to remove subsurface minerals. Neither at the time of this grant nor at the present time can the removal of oil and gas be said to relate in any way to construction of a railroad.[3]

(2). As for the possibility that a grant may nevertheless be found in the explicit terms of Section 2, it is again important to take account of the particular purposes of Congress in making its grants in the 1862 Act. At that time the construction of a railroad presented two basic problems to those contemplating such

[3] There has been no claim by respondent or suggestion by the courts below that extraction of oil and gas was or could be related in any way to the "construction" of the railroad.

a project. One was the existence of financial resources to pay for its construction, and the other was the acquisition of such a right in the land between the termini of the road as would permit the laying of the tracks and the erection of necessary buildings. No private entity in 1862 had either, and by this Act Congress set up such a private corporation (respondent's predecessor) for the express purpose of building the road, and spelled out the assistance the Government was willing to render in meeting the two related, yet distinct, needs of financial wherewithal for construction costs and of a physical situs for the location of the tracks and necessary appurtenances. The two objectives were to be obtained by different provisions of the Act.

Financial aid was the office of Section 3 (*supra*, pp. 2–3), which granted alternate odd-numbered sections of public land to the extent of five sections (increased in 1864 to ten sections, *supra*, p. 5, fn. 1) per mile on each side of the road. This grant was not "for the construction" of the road (as was the grant of the right of way in Section 2), but "for the purpose of aiding in the construction of" the road. That the land so granted was for the purpose of furnishing the required capital, through subsequent sale of such lands by the company, is clear from the final provision of Section 3 that "all such lands, so granted by this section, which shall not be sold or disposed of by said company within three years after the entire road shall have been completed, shall be subject to settlement and preëmption, like other lands, at a price not exceeding one dollar and twenty-five cents per

acre, to be paid to said company." In other words, while the road was under construction the company could realize any price the market would bring, but three years after completion of the entire road a settler could buy the land for the ordinary ceiling of $1.25 per acre.

It is also to be noted that, on the theory that the original outright grant of five sections per mile on each side of the road might not afford sufficient capital, supplementary aid was embodied in Section 5 of the Act which provided that, upon completion of each consecutive forty miles of the road, United States bonds of an aggregate value of $16,000 per mile should issue to the company, the company being required by Section 6 to pay such bonds on the maturity date (thirty years after issuance). And, as already noted (*supra*, p. 5, fn. 1), when still additional financial aid was deemed necessary, this was done by doubling the grant of "place lands."

The second aspect of the problem, furnishing a right in land for the physical location of the road, was dealt with in Section 2 of the Act, the provision here in question. That section (*supra*, p. 2) provided that "the right of way through the public lands be, and the same is hereby, granted to said company for the construction of said railroad and telegraph line" and further provided that "the right, power, and authority is hereby given to said company to take from the public lands adjacent to the line of said road, earth, stone, timber, and other materials for the construction thereof." These two grants, of

a right of way in certain public lands and of construction materials existing on adjacent lands, were clearly granted only for purposes of construction and not as a source of revenue. The grants in Section 2 are in each case "for the construction" of the road, not "for the purpose of aiding in the construction of said railroad," the stated purpose of the outright grant of "place lands" in Section 3, just discussed.

Furthermore, the grant of the right to take "earth, stone, timber, and other materials" from lands adjacent to the line of the road is practically identical with the provision of the General Right of Way Act considered by this Court in *Caldwell* v. *United States,* 250 U. S. 14, and was for the same purpose. See *supra,* pp. 12–13. The grant of such materials in Section 2 was therefore only to the extent that they were necessary to the construction of the road and was not a grant "as a means of business or of profit" to the company (250 U. S. at pp. 20–21). Similarly, the grant of the right of way itself, which was also specifically "for the construction of said railroad and telegraph line," was limited to "construction" requirements and was not a grant to respondent "as a means of business or of profit." There would thus be no grant of any interest in oil or gas underlying the right of way since use of those materials—like the tree remnants involved in *Caldwell*—would be purely for purposes of business or profit.

(*c*). In summary, the Government submits that while the grant of the right of way in Section 2 is to be liberally construed to effectuate its purposes,

this rule of liberal construction cannot be employed in order to vest rights in the company above, beyond, and entirely unrelated to the purpose of the grant. That rule is completely satisfied, and every legitimate railroad purpose is served, if the company's rights are confined to surface use of the right of way and so much below the surface as is necessary for support. The removal and conversion of minerals underlying the right of way, for profit, is outside the objective of the grant of the right of way, and the rule of strict construction applies. Respondent can point to nothing in the 1862 Act, in Section 2 or elsewhere, which expressly provides or even implies that Congress intended to vest mineral rights in the right of way in the grantee. On the contrary, the terms and purposes of Section 2—even if considered alone, without reference to the rest of the Act and the general policy of Congress at that time—show that no such grant of mineral rights was made.

B. THE FEDERAL POLICY OF CONVEYING MINERALS ONLY BY EXPRESS GRANT, IN EFFECT AT THE TIME OF AND EMBODIED IN THE GRANT, CONFIRMS THE VIEW THAT MINERALS UNDERLYING THE RIGHT OF WAY WERE NOT INCLUDED IN THE GRANT

We have just shown (Point I, A, pp. 11–18, *supra*) that, given its proper construction, the language of Section 2 of the 1862 Act containing the right of way grant, standing by itself, leads to the conclusion that subsurface minerals in the right of way did not pass to the railroad. This result need not rest on that section alone, however; it is confirmed by the statute as a whole when read in the light of the settled federal

policy, in effect at the time of the grant, of excepting minerals unless they were specifically conveyed.

This Court said in *Great Northern Ry. Co.* v. *United States,* 315 U. S. 262, 273, that the General Right of Way Act of 1875 "was the product of a period, and, 'courts, in construing a statute, may with propriety recur to the history of the times when it was passed.' " There, the Court based its decision on a change of policy under which the Government ceased making land grants and substituted grants of a right of way only, rejecting an argument based on the identity of language in the grant of right of way in the 1875 Act and the prior so-called "limited fee" grants. A still earlier change of federal policy in making grants of all kinds comes into play here. The Union Pacific Act was also the product of its period, and the "history of the times" when that Act was passed, bearing on the question here presented, has already been documented by decisions of this Court.

1. The grant to respondent was made in 1862, and in the twelve years preceding it federal policy with respect to mineral lands had completely changed. Prior to 1849, no distinction was made between mineral lands and agricultural lands in federal grants, and such grants passed the one as readily as the other. But Congressional concern about minerals underlying the public domain was generated by the gold strike in California. Thus, when Congress extended the land laws of the United States to the public lands of California, it provided in Section 6 of the Act of March 3, 1853, 10 Stat. 244, that:

> * * * all the public lands in the State of California * * * with the exception of sections sixteen and thirty-six, which shall be and hereby are granted to the State * * * and excepting also * * * the mineral lands, shall be subject to the preëmption laws of the fourth September, eighteen hundred and forty-one * * * and shall * * * be offered for sale * * * under the laws, rules, and regulations now governing such sales, or such as may be hereafter prescribed * * *.

This Act, although limited to California, established a policy—which, as we will show, was later generally adopted—of disposing of minerals only by statutes expressly dealing with minerals. It will be noted that the only specific exception of mineral lands contained in Section 6 of the 1853 statute, quoted above, was their exclusion from the operation of the pre-emption laws, and that the grant to the State of sections sixteen and thirty-six contained no such exception. In *Mining Co.* v. *Consolidated Mining Co.*, 102 U. S. 167, the question was squarely presented whether the grant to the State of those two sections included such lands if they were mineral. This Court reasoned, on the basis of the exception of mineral lands from the pre-emption laws and express exceptions of mineral lands granted to the State in other provisions of the Act, that the statute fixed a definite policy, so far as California was concerned, of withholding mineral lands, and that the grant to the State of sections sixteen and thirty-six, *although not containing an express reservation of mineral lands,* nevertheless did not include them.

In the course of its decision, rendered in 1880, the Court set forth the development of federal policy with regard to mineral lands generally. It pointed out (102 U. S. at pp. 172–173) that prior to 1850, when California was organized, the territory which later became the State was found to be rich in minerals, and that this gave rise to conflicting views among American statesmen as to what long-range general policy with regard to mineral lands was to be adopted, and that the question was finally settled in 1866 by the Act of July 26, 1866, 14 Stat. 251, prescribing a special method by which mineral lands could be acquired. The Court characterized the statute (p. 174) as "so totally different from that which governs other public lands as to show that it could never have been intended to submit them to the ordinary laws for disposing of the territory of the United States."

Of the period intervening between 1849 and 1866, the Court stated (102 U. S., pp. 173–174):

> During this period, however, from 1849 to 1866, the system of the disposition of the public lands in general had to be introduced into California, and grants of land were made to the State for various purposes, also to railroad companies; and *in all this the attention of Congress was necessarily turned to the distinction between mineral lands and the ordinary agricultural lands of the other Western States to which similar laws had applied.* This distinction is nowhere more plainly manifested than in this act of 1853. * * *
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> * * * * * *
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> * * * so careful was Congress to protect mineral lands from sale and pre-emption, that,

as we have already shown by the proviso to sect. 3 of the act, the surveyors were forbidden to extend their surveys over them.

The effect of this was as Congress intended it should be, that, as no surveys could be made of mineral lands until further order of Congress, there could be no sale, pre-emption, or other title acquired in mineral lands until Congress had provided by law for their disposition. The purpose of these provisions was undoubtedly to reserve these lands, so much more valuable than ordinary public lands, and the nature of which suggested a policy different from other lands in their disposal, for such measures in this respect as the more matured wisdom of that body, which by the Constitution is authorized to dispose of the territory or other property of the United States, should afterwards devise. [Emphasis added.]

Likewise, a grant to the State of Utah in 1894 of sections two, sixteen, thirty-two and thirty-six, which did not contain an express reservation of mineral lands, was nevertheless held to be limited to non-mineral lands. *United States* v. *Sweet*, 245 U. S. 563. The Court first observed that the grant neither expressly included mineral lands nor expressly excluded them, and that if it did either there would be no question. But since the grant did not mention mineral lands the Court found it "essential to inquire whether the congressional will is otherwise made manifest, that is to say, whether the general words of the grant are to be read in the light of other statutes and a settled policy in respect of mineral lands" (245 U. S. 563,

567). Using this measuring rod, the Court held that, since the settled policy had been adopted by the Government, prior to 1894, of disposing of mineral lands only under laws specially including them, the subsequent grant in 1894 after that policy was established did not include mineral lands.

Thus, the Court has clearly recognized that, after the establishment of the federal policy of reserving mineral lands for disposition only under laws specifically providing for them, any "open" grants—grants neither reserving nor conveying mineral rights—should be read as not including them.[4]

2. The grant to the Union Pacific in 1862 must be read in the light of this policy, because it is beyond question that that policy, well developed by this time, was in the mind of the Congress when it passed the statute under which respondent claims. For instance, Section 3 of the Act, which provided for grants of alternate sections in fee to be sold by the company, contained an express exception of mineral lands from the operation of the Act. Moreover, while a general statutory method for acquisition of mineral lands was not enacted until 1866 (see *supra*, p. 21), this Court has made it clear that the policy of excepting mineral lands from grants under other laws was firmly established by 1862. In *United States* v. *Sweet*, 245 U. S. 563, 569, the Court cited a number of instances where Congress had expressly excepted mineral lands from

[4] An extensive discussion of this special minerals policy it contained in *West Coast Exploration Co.* v. *McKay*, 213 F. 2d 582 (C. A. D. C.), certiorari denied, 347 U. S. 989.

its grants, including the reservation of mineral lands from this grant to Union Pacific, and said of them that "these declarations were but expressive of the will of Congress that every grant of public lands, whether to a State or otherwise, should be taken as reserving and excluding mineral lands in the absence of an expressed purpose to include them * * * ". That these restricted grants were but examples of a general and fixed policy regarding minerals had also been noted in the much earlier decision in *Barden* v. *Northern Pacific Railroad,* 154 U. S. 288, 317.[5]

The legislative history of the Union Pacific Act confirms this view. While the bill was under consideration in the House (H. R. 364, 37th Cong., 2d Sess.), one member became exercised by the probability that "place lands" to be acquired by the company in fee, thought to be non-mineral when patented, would later turn out to be valuable mineral land. To protect the Government's rights he proposed an amendment which would have subjected such lands, after conveyance by the Government, to mineral entry by third

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[5] The statute here involved embodied the first *express* implementation with respect to railroad grants of the new policy as to minerals. (The policy had earlier been made effective with respect to other types of grants.) The withdrawal of minerals was also the first step in a general program of retrenchment in railroad grants which, as hereafter developed (*infra*, pp. 41–45), finally resulted in legislation granting to such companies nothing beyond a mere right of way easement. The policy thus initiated in 1862 (with respect to railroad grants) was reflected within three years in the Act of January 30, 1865, 13 Stat. 567, in which the 38th Congress provided that no act passed at its first session to aid in the construction of roads "shall be so construed as to embrace mineral lands." *Barden* v. *Northern Pacific Railroad*, 154 U. S. 288, 312.

parties, the owners of the lands to be compensated by such parties for any injury to the lands by reason of exploratory and mining operations. This proposal was understandably and properly rejected, it being pointed out that the amendment "proposes to allow the public to enter upon the lands of any man, whether they be mineral lands or not" and that "the man who * * * commits the injuries may be utterly insolvent, not able to pay a dollar." The objection to the amendment was not grounded on consideration of the interest of the railroad company, but upon concern for those to whom the railroad company had to sell the granted "place lands," or those settlers who might pre-empt land unsold by the railroad. Although the amendment was rejected, the Congress was given this assurance (Congressional Globe, 37th Cong., 2d sess., Pt. 2, pp. 1909–1910):

> The mineral lands through which this road is to pass are already excepted in this bill from the lands granted to this company. They will still belong to the Government of the United States. * * *

No distinction was made, it should be noted, between "place" mineral lands and minerals under the right of way. Indeed, the statement underlines the strong intention of Congress that mineral resources were not knowingly to be given to the railroad.[6]

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[6] It was also stated in the Senate that "all mineral lands are excluded from the operation of this act, and in their stead a like quantity of unoccupied and unappropriated agricultural lands nearest to the line of the road may be selected in alternate sections." Cong. Globe, 37th Cong., 2d Sess., Pt. 3, p. 2814.

There is additional evidence that the Congress which passed the statute did not intend to endow the company with any mineral riches. As it passed the House, the exception of mineral lands in Section 3 read: "*Provided,* That all mineral lands shall be exempted from the operation of this *section*" [Emphasis added]. An amendment striking out the word "section", and inserting in lieu thereof the word "act," was offered in the Senate, and accepted by that body without question, as well as by the House. Cong. Globe, 37th Cong., 2d Sess., Pt. 3, p. 2756. See *supra*, p. 3. While this amendment, if applied literally to the right of way grant, might have made it impossible to construct the road, because few if any, routes were possible which wholly avoided mineral lands,[7] the change from "section" to "act" does tend to show that Congress was not content with merely withholding mineral lands from the "place" grant, but that it intended to bar the railroad from obtaining mineral deposits under any provision of the Act, including Section 2 granting the right of way.

3. The only basis given by the Court of Appeals for failure to apply the Congressional mineral policy here is the argument that there is a difference between a reservation of mineral lands from a grant and a reservation of minerals in lands granted (R. 23). As

[7] As pointed out below (*infra*, p. 30), the proviso can be given full effect in the right of way, in accord both with the proviso's purpose and with the objective of the grant of the right of way, by holding that with respect to the right of way the proviso excepts underlying mineral rights but not the surface area.

we understand it, the theory is that since the only reservation in the Act was of mineral lands (as a whole) in Section 3, there was necessarily no reservation of minerals from lands granted for the right of way under Section 2.

Our first answer is that the Court of Appeals is in effect relieving respondent of the burden of showing affirmatively that the grant of the right of way included minerals, and instead is saddling the Government with the converse burden of proving an express reservation of minerals, in total violation of the rule of construction we have shown to be applicable (*supra,* pp. 11 *ff*) as well as of the special minerals policy Congress adopted (*supra,* pp. 19 *ff*).

Secondly, the Court of Appeals erroneously calls upon *Burke* v. *Southern Pacific R. R. Co.,* 234 U. S. 669, to support its view. That case did not involve any question as to mineral rights under a right of way. It related to "place lands" such as were granted outright by Section 3 of the 1862 Act, and held that, when the railroad qualified to receive patents for "place lands" and selected such lands, the statute contemplated that a conclusive administrative determination of the character of the lands as mineral, and hence non-patentable, or as agricultural and subject to patent, had to be made. The Court held that a patent must issue on the one basis or be refused on the other; that such a determination could not be avoided or kept open for the future by the action of government officers in including in the patent an exception of "all mineral lands should any such be found in the tracts

aforesaid"; and that such an exception was unauthorized by the statute.

As we have pointed out (*supra*, pp. 14 *ff*), the grant of non-mineral "place lands" by Section 3 is entirely distinct from the grant of right of way in Section 2 here involved, and was for an entirely different purpose. The "place land" grant, to be implemented by issuance of patents under Section 4 of the Act (*supra*, p. 3) periodically at the completion of each 40 miles of road, was for the end of maintaining the company in such financial status as would enable it to continue the work of further extending the construction of the road until its completion.

Speedy administrative determination of the character of the lands once selected, as mineral or non-mineral, followed by their early patenting if found to be non-mineral, was essential to insure their ready availability for sale as a source of financial aid to the company. Similarly, maximum marketability of the title to be conveyed by the patents authorized was likewise necessary to ready realization of the financial assistance intended to be given the company. Hence, a patent with no strings attached was held in the *Burke* case to be required. This is merely another illustration of the rule of liberal construction to accomplish the purposes of the grant—in this instance, the financing of the railroad. See *supra*, pp. 11–12. That mineral lands might be patented through mistake or lack of knowledge meant only that the grantee acquired them, not as mineral lands, but, due to ignorance of their true character, as agricultural lands.

The holding in *Burke* is that, based upon considerations peculiar to the objectives of the "place land" grant, Congress limited the extent to which its intention not to pass mineral wealth could be safeguarded by the administrative officers. The Court was not announcing the principle, in effect applied against the Government in this case, that the railroad gets anything not expressly reserved. Rather, upon factors special to the "place land" grant, the Court found in the statute an affirmative intention on the part of Congress, under certain conditions, that the railroad acquire by patent an absolute fee simple.[8]

When it comes to the right of way grant, none of the elements characteristic of the "place land" grant

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[8] For similar reasons it is likewise irrelevant that, as noted by the Court of Appeals (R. 23), the homestead and other general land laws authorizing acquisition of public lands contained a reservation of mineral lands rather than a reservation of minerals. Those laws also contemplated and required the issuance of patents when their requirements were met by settlers, just as in the "place land" grant to respondent. And for the reasons given in the text, the fact that, through ignorance of the real character of mineral lands, patents might issue for such lands on the theory that they were non-mineral, does not qualify the obvious purpose of Congress not to part *knowingly* with minerals even under those laws. Equally irrelevant is the circumstance, also noted by the court below, that it was in the Stock-raising Homestead Law of 1916, 43 U. S. C. 291, that Congress first provided for issuance of patents with a reservation of minerals. This shows, not that the mineral policy we rely on did not exist, but rather an intention to eliminate the loophole through which the policy had been partially frustrated under prior laws where patents were required to issue. This later historical development has no tendency to establish that Congress in 1862 intended to give respondent the minerals under the right of way lands. No patents were ever to issue for such lands and thus as to those lands no loophole had ever existed.

involved in the *Burke* case are present, and respondent cannot assert, in view of the "limited fee" causes (discussed *infra*, pp. 32 *ff*), that it was ever to receive an absolute fee in the right of way lands. The right of way lands were never to be a source of profit to the respondent through sale; they were never to be granted outright to the company; no patents for the lands were to be issued; and the grant of such land was for a specific purpose "which negated the existence of the power to voluntarily alienate the right of way or any portion thereof." *Northern Pacific Ry.* v. *Townsend*, 190 U. S. 267, 271. See the discussion, *supra*, pp. 13 *ff*. Hence, there was no need for a requirement that the lands constituting the right of way should be classified by government officers, at any particular time, as mineral or non-mineral. In other words, the question decided in *Burke* does not and cannot arise with respect to right of way lands. With respect to "place lands," Congress had to resolve a conflict between its policy not to grant minerals and the considerations of ready marketability applicable to land to be sold by the railroad. No such conflict could occur as to the right of way, and there was no need or justification for nullifying or restricting that mineral policy to the advantage of respondent.[9]

[9] Moreover, as we have mentioned (*supra*, p. 26), lands which happened to contain minerals could not be totally excepted from the right of way which had to follow a reasonably straight line. Instead, the minerals policy could be and was effectuated, not by excepting the total surface area, but rather by withholding the minerals in the land constituting the right of way. The "mineral lands" proviso in Section 3 can and does operate in that fashion in the right of way.

II

THE DECISIONS RELIED UPON BY RESPONDENT DO NOT, WHEN PROPERLY INTERPRETED, SUPPORT THE JUDGMENT BELOW

Thus far, we have undertaken to show that, if the grant of the right of way is given a fair and proper construction, title to the underlying minerals was not intended by Congress to pass to the respondent. If that position is sound, there is no need to consider the precise nature of the title or interest of the company in the right of way in terms of dictionary or conveyancing categories. Whatever label be applied to the company's interest—"limited fee" or "easement" or something else—that interest in any event did not include the minerals underlying the right of way.

However, the trial court's theory of decision, as we have noted (*supra,* pp. 5–6), was that the railroad company's grant vested it with a "limited fee" in the right of way lands, subject only to the requirement that it build and continue to operate the road; that no other limitations upon the grant existed; and thus that the company could remove the oil and gas. This real property conveyancing approach was also the primary ground of decision of the Court of Appeals; its opinion (R. 19) shows that its conclusion that the railroad acquired a "limited fee" in the right of way—entitling it to remove the underlying minerals—was based upon certain decisions of this Court, some of which had been noted but not deemed controlling by the trial court (R. 9–10).

In this Point, we shall meet the rulings below on their own ground and show that those decisions do not justify a holding that the respondent railroad, under the grant of right of way, ever acquired title to the underlying oil and gas.

A. PRIOR DECISIONS DO NOT PRECLUDE A HOLDING THAT UNDER ITS GRANT THE RESPONDENT ACQUIRED NO INTEREST IN THE MINERALS BENEATH THE RIGHT OF WAY

The trial court observed (R. 8) that "It would seem that the particular issue here to be resolved heads into virgin legal territory, as counsel seem to agree that there are no cases which form a precedent as being on all fours with the case at bar." The Court of Appeals also conceded that no previous decision is squarely in point (R. 21): "It is urged [by the Government] that the cases hereinabove cited are not authority here because the United States was not a party and the right to minerals underlying rights of way was not being considered. This is true."

Since the cases relied upon by the courts below and by respondent did not involve the question of whether the Government passed title to the minerals underlying the right of way, the only problem is whether, by implication or otherwise, these prior decisions counsel this Court, now reaching the precise issue for the first time, against a completely independent examination and decision of the question *de novo*. We say they do not.

1. *The "limited fee" decisions*

The Court of Appeals cited (R. 19) seven decisions of this Court in support of its conclusion that the

respondent acquired a limited fee in the right of way lands. In none of them, save *Clairmont* v. *United States,* 225 U. S. 551, was the United States a party, and this fact alone suffices to show that the question of the title of the United States to oil and gas underlying a right of way, vis-a-vis its grantee railroad company, was not involved. Nor was any such question involved in the *Clairmont* case.[10]

Of this Court's prior decisions cited by the court below, the leading case is *Northern Pacific Ry.* v. *Townsend,* 190 U. S. 267. The only question there was whether third parties could make valid homestead entries upon portions of the right of way after the railroad company had located its right of way and laid its tracks. In the first paragraph of the opinion (p. 270), the Court stated that, upon the railroad's having complied with the Act, "the land forming the right of way therein was taken out of the category of public lands subject to preëmption and sale, and land department was therefore without authority to convey rights therein" to third parties. It was in answering an argument that title had vested in the trespassers by adverse possession that the Court stated that the company had a limited fee in the right of

[10] The *Clairmont* case is irrelevant. That was a criminal proceeding and the question was whether the defendant, found to be transporting liquor on a train at a point where the railroad's right of way passed through an Indian reservation, had violated federal laws regarding introduction of liquor into "Indian Country." It was held that the right of way was not Indian Country because, following the grant of the right of way by the United States to the railroad, the Indians had ceded all of their right and title to the right of way strip to the United States.

way. We suggest that it was hardly necessary to reach the question of the precise nature of the railroad's interest in the right of way, since it could not be maintained on any reasonable ground that an Act which put the right of way beyond the power of disposal of the Government's land officers nevertheless permitted a divesting of the railroad's rights by any other means.

In any event, the statement that the grant "was of a limited fee, made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted" does not, of itself, have any real bearing on the question now here. As we have noted, ownership of the minerals was not involved, and the Court therefore had no occasion to examine the grant from that standpoint. There is nothing in the case which precludes the Court from now holding that the company's "limited fee" in the right of way does not embrace ownership of the minerals to use them for its profit. The term "limited fee" does not necessarily include a conveyance of underlying minerals. Cf. *Los Angeles & Salt Lake Railroad Co.* v. *United States*, 140 F. 2d 436 (C. A. 9), certiorari denied, 322 U. S. 757.[11] And it should be noted, in connection with our

[11] See *United States v. Big Horn Land and Cattle Co.*, 17 F. 2d 357, 365 (C. A. 8) (indicating that a "limited fee" can be "in the nature of an easement"). It is always a question of the true intention and purpose of the grantor. In this case, what was granted respondent is a matter of federal law, and, as we have shown, it was the intention of Congress not to grant minerals underlying the right of way. In this connection,

argument in Point I (*supra*, pp. 14 *ff*), that in the *Townsend* decision the Court also said (190 U. S. at p. 271) that the grant of the right of way "was explicitly stated to be *for a designated purpose*, one which negated the existence of the power to voluntarily alienate the right of way or any portion thereof" (emphasis added). See also *infra*, pp. 48 *ff*.

Even weaker are the decisions in *New Mexico* v. *United States Trust Co.*, 172 U. S. 171, and *St. Joseph & Denver City R. R. Co.* v. *Baldwin*, 103 U. S. 426. In the first, the only question was whether a federal statute which exempted a railroad right of way from state taxation operated to confer an exemption on fixed improvements erected on the right of way, such as station houses. Here again, we suggest that it is questionable whether an answer to this problem required the Court to reach the issue of the railroad's interest, since the improvements became in law a part of the right of way itself, and it could well have been held that such improvements were in contemplation when the granting Act was passed, regardless of what the interest of the company might be.

Moreover, that ruling was premised on the initial proposition that Congress, by restricting the railroad to a precise route across public lands and of a prescribed width, had invested the company with some-

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resort cannot be had to the incidents and nature of a private grant under local law to determine the nature of the federal grant, for resort to state law cannot be allowed to overturn the purpose of Congress. See *Northern Pacific Ry. v. Townsend*, 190 U. S. 267, 270–271. See also the discussion, *infra*, pp. 47–48.

thing more than a mere right of passage. But the physical limitations imposed by Congress do not have the slightest tendency to indicate that Congress intended to convey minerals. As a practical matter it was of course known in advance that the road would not run over one route one day and over a different route the next, and the width limitation reflected an intention to give to the road a right of way sufficient for construction and operation of the railroad, and no more. Confinement of the right of way to a definite route through the public lands also functioned to identify the "place lands" to be granted to the company for sale and to fix the belts from which such lands might be selected. It is anomalous to suppose that this insistence by Congress on narrowing the area of the right of way furnishes a basis for implying that Congress intended to broaden the estate conveyed so as to vest the company with the minerals. And, as in the *Northern Pacific* case, *supra*, the Court's passing characterization of the company's interest in the right of way (172 U. S. at p. 183) as "more than an ordinary easement" was not given with any question as to minerals in mind.

St. Joseph & Denver City R. R. Co. v. *Baldwin*, 103 U. S. 426, *supra*, presented only the issue of whether third parties, after the line of the railroad had been fixed in accordance with the statute granting the right of way, could acquire title to lands later found to be part of that right of way. The Court pointed out (p. 430) that "If the company could be compelled to purchase its way over any section that might be

occupied in advance of its location, very serious obstacles would be often imposed to the progress of the road." Once again, the ruling might have rested upon this fact alone, since such a result could hardly have been contemplated in making the grant. This, too, is simply another application of the principle of liberal construction of the grant in order to effectuate its purpose (see *supra*, pp. 11–12).

In any event, in this case as in the others, the Court had no occasion to consider the question of whether minerals were reserved and this problem was not in any way before the Court. Its reference to the right of way grant as "a grant in praesenti" and as "a present absolute grant, subject to no conditions except those necessarily implied, such as that the road shall be constructed and used for the purposes designed" by no means precludes this Court from holding that the minerals were excepted from the grant.

The same is true of the other cases cited by the Court of Appeals—the Government was not a party and its title to the minerals was not in question and not under consideration in any of them. In *Missouri, Kansas & Texas Ry. Co.* v. *Roberts*, 152 U. S. 114, there was a contest between the railroad and a private citizen who claimed land forming a part of the right of way under a patent from the State of Kansas, the contention being that the disputed part had belonged to the State as part of a school-land grant. This Court held that the original claim of the State to Sections 16 and 36 as school lands was rejected by Congress and abandoned by the State, and that the Gov-

ernment in 1866, when it granted the right of way, was free to dispose of such lands. It is true that, in discussing the grant to the railroad, the Court stated (p. 116) that the right of way "was granted to the company unconditionally" and that the United States had the right "to grant absolutely the fee of the two hundred feet as a right of way to the company" and that (p. 117) "That grant was absolute in terms, covering both the fee and possession, and left no rights on the part of the Indians to be the subject of future consideration." But here too the rights of the Government vis-a-vis the railroad were not in contemplation, and the Court's expressions were merely part of its holding that the Government could, in making the grant to the railroad, extinguish the Indian title and intended to do so.[12]

Similarly, in *M., K. & T. Ry.* v. *Oklahoma*, 271 U. S. 303, the question was the validity of a contract between the railroad and a city granting the latter a right of way to construct a street under the railroad right of way. As to the company's right to make the contract, it was simply stated (p. 308) that "The company owned its right of way lands * * * in fee," citing the *M., K. & T.* case just discussed. In this case, as in the others, there was no real construction of the grant from the standpoint of the rights granted the railroad on the one hand and retained by the Government on the other in the right of way lands or the minerals

[12] One of the issues discussed by the Court was whether the United States had the right to dispose of certain lands in an Indian reservation.

underlying them. We may add that the declaration in the first of these two *M., K. & T. Ry.* cases, if its language is taken out of context, that the grantee acquired an "absolute" fee or fee simple was overturned by the subsequent decision in the *Townsend* case, 190 U. S. 267 (*supra*, p. 33).

Finally, the remaining case cited by the Court of Appeals, *Union Pacific R. R.* v. *Laramie Stock Yards*, 231 U. S. 190, while it involved the right of way here in question, was another contest to which the Government was not a party and in which its rights were not being adjudicated or even considered. The controversy was between the railroad company and a private individual who claimed title by adverse possession. The holding was that a federal statute making state statutes of limitation applicable was not retroactive and did not apply to adverse possession prior to its enactment; and that a sufficient time after the act became operative had not elapsed to establish such a title. It is true that the Court stated (p. 198) that "It is established that the right of way to the several railroads was a present absolute grant, subject to no conditions except those necessarily implied, such as that the roads should be constructed and used." But here again there is no detailed analysis of the grant essential to a decision of the present question, any more than in the cases previously discussed.

We have no quarrel with these "limited fee" cases so far as they actually go. They did not involve the issue now before the Court, and the question in this case is not whether they should be overruled but

rather whether they should be extended, as the Court of Appeals has done, to govern the interest and title of the United States in the underlying minerals. While those decisions characterized grants of right of way as "limited fees", they did not embody an analysis of the grants from the viewpoint of the United States such as we have made (*supra*, pp. 11 *ff*), and which, we submit, the Court should consider in passing for the first time on the title of the United States to the underlying oil and gas.[18] Specifically, there was no examination of the precise purposes of the grants and no consideration of the shift in federal policy as to minerals and its express implementation in the various granting acts. But, as we have pointed out, the *holdings* themselves were proper on the principles we believe correct. The interests in the rights of way asserted by third parties against the railroads were generally, as in *Northern Pacific Ry.* v. *Townsend*, 190 U. S. 267, claims which would, if sustained, deprive the railroad of *all* rights in portions of a right

[18] The situation is similar to one before this Court in *Barden* v. *Northern Pacific Railroad*, 154 U. S. 288. That case involved "place lands" rather than right of way lands, and the question was whether the railroad was entitled to patents to lands which, after the company had qualified by meeting the building requirements, but before issue of patents, were found to be mineral lands. In discussing two previous decisions relied on as controlling by the railroad, and which this Court refused to extend, the Court stated (p. 315): "In both of those cases the writer of this opinion had the honor to write the opinions of this court; and it was never asserted or pretended that they decided anything whatever respecting the minerals, but only that the title to the lands granted took effect, with certain designated exceptions, as of the date of the grant."

of way given by Congress for railroad purposes. In *New Mexico* v. *United States Trust Co.*, 172 U. S. 171, New Mexico's claimed right to tax, in the face of a Congressional exemption, would, if upheld, have conditioned the railroad's continued operation of the road upon a payment of money to the State. In these situations, doubts were properly resolved in favor of the railroad.

If, as in such cases, the "limited fee" doctrine is confined to a holding that the railroads received a "limited fee" in the surface of the right of way and so much below the surface as is necessary for physical support, every legitimate interest and railroad construction purpose contemplated by the grant is served. But in the instant case the right asserted by the United States in no way impairs the efficacy of the grant of right of way to respondent, nor does it prejudice respondent's full use of the right of way for the railroad purposes for which the Government granted it. Accordingly, the "limited fee" principle is inapplicable here, and the Court should neither be controlled nor influenced by the broad and general statements found in these opinions. See *United States* v. *California*, 332 U. S. 19, 36–39.

2. *The Great Northern decision*

While, as we have noted (*supra*, p. 32), the Court of Appeals readily acknowledged that the question now before this Court was not involved in any of the "limited fee" cases, that court (R. 21–22) read the decision in *Great Northern Ry. Co.* v. *United States*, 315 U. S. 262, as sustaining the railroad's right to

minerals under any grant prior to 1871 (R. 22). The court flatly stated (R. 22), with reference to *Great Northern*, that "no other conclusion can be reached than that had the court been considering right of way grants made prior to 1871, it would have followed the 'limited fee' cases and held that such title carried with it the right to remove the minerals." This, we submit, is an incorrect extension of this Court's decision, unwarranted either by its holding or the opinion.

The *Great Northern* case did not involve a grant of right of way under a land-grant statute such as we have here. That railroad company had a right of way grant under the General Right of Way Act of March 3, 1875, 18 Stat. 482. That Act, of general application, provided for the acquisition of rights of way through the public lands, unaccompanied by any grant of lands in fee to aid in financing the railroad. The company argued that the language of the right of way grant was in substance the same as the grants of right of way in the line of "limited fee" cases just discussed (*supra*, pp. 32–41), and contended that on the basis of those decisions the railroad acquired the minerals underlying the right of way. The Government, while not conceding that this line of decisions brought about that result, properly relied primarily on the differences between the 1875 Act and the prior land-grant acts, and on a well-documented history of a policy of discontinuing the financing of roads largely at public expense, a policy progressively embodied in special acts prior to 1875 and resulting in the enactment of the general 1875 Act granting rights of way only.

This Court accepted the Government's position and, accordingly did not pass upon the relevance of the "limited fee" cases, stating (p. 278) that they "deal with rights of way conveyed by land-grant acts before the shift in Congressional policy occurred in 1871."

The Court did, however, reject the view of *Rio Grande Western Ry. Co.* v. *Stringham*, 239 U. S. 44, 47, and dicta in two later cases, which applied the "limited fee" cases to an 1875 Act case. It did so on the ground that the *Stringham* conclusion did not take account of the change of congressional policy between 1871 and 1875 and was "inconsistent with the language of the Act, its legislative history, its early administrative interpretation and the construction placed on it by Congress in subsequent legislation. We therefore do not regard it as controlling." For precisely the same reasons, we say that the change of congressional mineral policy between 1849 and 1862, the language of the 1862 Act, its legislative history and its legislative and administrative construction, rather than the decisions in the "limited fee" cases, control this case.

The *Great Northern* opinion did say regarding the "limited fee" decisions (315 U. S. p. 278): "When Congress made outright grants to a railroad of alternate sections of public lands along the right of way, there is little reason to suppose that it intended to give only an easement in the right of way granted in the same act." This suggests perhaps that the holdings in this series of cases turned not so much upon the language of the right of way grants as upon the fact that, apart from the right of way, the grantees were being

given tremendous acreages outright, characterized as "lavish grants" (p. 273).[14] If this be an accurate explanation of the basis of the "limited fee" decisions, they are certainly irrelevant here because other considerations and other policies of the Government come into play as to the mineral question.[15] The grant of the right of way and the grant of "place lands" were, as we have already noted (*supra*, pp. 14 *ff*), two distinct grants for differing purposes. Though Congress may perhaps have erred in too lavishly dispensing non-mineral "place lands," or in overestimating the amount of subsidy needed to construct the road, that fact has, we think, no bearing on the construction of the right of way grant other than to emphasize that minerals were not intended to pass under any section of the Act since they were indisputedly excluded from the lavish "place" grants. And if Congress was too liberal in dispensing "place lands," from which Congress excluded mineral lands, we submit that the error should not be compounded by this Court's enlarging the holdings in the earlier cases to include minerals underlying the right of way.

That this Court was not, as the Court of Appeals erroneously concluded, agreeing that the "limited fee" decisions in effect decided the question now before the

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[14] The Court also said (315 U. S. at p. 273, fn. 6): "In view of this lavish policy of grants from the public domain it is not surprising that the rights of way conveyed in such land-grant acts have been held to be limited fees."

[15] It is significant that, in these "limited fee" decisions, there is no reference to the special mineral policies of Congress (*supra*, pp. 32–41).

Court is, we believe, also demonstrated by the statement in *Great Northern* (315 U. S. at p. 278) that "None of the [limited fee] cases involved the problem of rights to subsurface oil and minerals." This observation was made in the light of a more explicit rejection by the Court of Appeals, in its ruling in *Great Northern*, of the "limited fee" decisions as controlling on the issue of title to the underlying minerals. The case was styled in the Court of Appeals as *MacDonald* v. *United States*, 119 F. 2d 821 (C. A. 9), and that court, replying to the argument that these "limited fee" decisions disposed of the issue of title to minerals underlying the rights of way, stated (p. 824):

> * * * It would serve no useful purpose to undertake here a statement of the facts of these cases or of the way in which the question of title arose; enough to say that in none of them was the court confronted with the question of the ownership of underlying minerals. We do not believe the holdings are decisive of that question. So far, however, as concerns the surface area embraced in the federal right of way grants, it may be taken as settled that the title of the railroads is the equivalent of a fee, limited only by the possibility of reverter.

3. *The Illinois Central litigation*

Both courts below also regarded (R. 9, 22) *United States* v. *Illinois Central R. Co.*, 89 F. Supp. 17 (E. D. Ill.), affirmed, 187 F. 2d 374 (C. A. 7), as supporting the conclusion that title to the minerals passed to respondent. That case likewise involved the question

of whether the company or the United States owned the oil underlying the company's right of way. The railroad's rights stemmed from the Act of September 20, 1850, 9 Stat. 466, which made a grant to the State of Illinois similar to that here involved, but with important differences. While the section granting the right of way was substantially the same as in the instant case, there was no express reservation of mineral lands from the operation of the Act nor any indication that Congress intended to reserve minerals. The State conveyed its rights to the railroad company "in fee simple."

In arriving at the conclusion that minerals passed to the company, the trial court held, on the authority of *Northern Pacific Ry.* v. *Townsend,* 190 U. S. 267, discussed above (*supra,* p. 33), that the company had a "limited fee" in the right of way, that the incidents of such a grant were to be determined by Illinois law, and that under that law the railroad could make any use of the right of way which did not interfere with operation of the road, and so could extract the minerals. The trial court stressed the absence of any language in the granting statute reserving mineral lands, and stated (89 F. Supp. p. 24): "It is believed that had an intent to reserve the minerals existed it would have been expressed as was the practice of Congress during the period *preceding 1871* in making grants in which mineral lands and mineral rights were withheld." [Emphasis added.] The Seventh Circuit, in a *per curiam* opinion, affirmed on the reasoning of the trial court, but appears to have been impressed by the circumstance

that the deed from the state to the company purported to convey a fee simple interest in both the right of way and the "place lands."

Our observations on this case are threefold. First, it is clearly distinguishable. The grant to Illinois was made in 1850, at a time when the federal policy of withholding minerals had not been developed (see *supra*, pp. 19–23), and the Act contained no express indication that Congress intended to withhold minerals or was at all concerned about them. The very elements which the District Court found lacking in the Illinois grant and which presumably would have led that court to a contrary conclusion, are, as we have demonstrated, present in this case. Second, the decision is erroneous because the grant of right of way there involved, standing alone, did not pass minerals under the applicable rules of construction we have discussed (Point I, A, *supra*, pp. 11 *ff*) and because the court misconceived the meaning of the "limited fee" cases.

Third, as to the suggestion by the Seventh Circuit that state law controls the nature of the railroad's interest, we point out, initially, that in the present case the grants were directly to the railroad and not through the conduit of a state. Moreover, we submit that, since the intent of Congress to reserve minerals from the grant in this case is so evident, it is unthinkable that Congress nevertheless intended that its objective might be defeated by construction of the grant under state laws. The road was to pass through a number of states, not all of which had been organized in 1862, and it is unlikely that Congress con-

templated that the Government's retention of minerals should be effective in one state and not in another, according to local law. While it has been stated in private suits that federal grants will be construed without reference to local law, but that the incidents of a federal grant may be determined by such law (*Northern Pacific Ry.* v. *Townsend,* 190 U. S. 207, 270; *Packer* v. *Bird,* 137 U. S. 661, 669), it seems clear that local law can have no bearing here. On no reasonable theory can Congress be supposed to have contemplated that local law should intervene to vest minerals in the railroad if, as we maintain and believe we have shown, Congress intended to withhold them.[16]

B. THERE HAS BEEN A LONG AND UNIFORM ADMINISTRATIVE CONSTRUCTION, AS WELL AS A CONGRESSIONAL INTERPRETATION, THAT THE "LIMITED FEE" IN SUCH RIGHT OF WAY GRANTS CONVEYS NO INTEREST IN MINERALS

The administrative interpretation placed upon these grants, while not conclusive upon the courts, is nevertheless "pertinent to the construction of the Act." *Great Northern Ry. Co.* v. *United States,* 315 U. S. 262, 275. While the administrative officials have bowed to the language in the opinion of the Court in *Northern Pacific Ry.* v. *Townsend,* 190 U. S. 267 (discussed *supra,* pp. 33–35), and construed grants of a right of way such as here involved as vesting a "limited fee" in the grantee, it has been uniformly ruled over a period of 50 years that such a "limited fee" does not include subsurface minerals, and that the minerals remain the property of the United States.

[16] The Wyoming law is, at best, inconclusive (R. 10).

Within two years of the decision in *Northern Pacific Ry. v. Townsend, supra,* in 1903, the question was presented to the Interior Department whether the Missouri, Kansas and Texas Railway Company could validly execute an oil and gas lease on a portion of its rights of way and terminal ground. Pointing out that the M. K. T. grant was similar to the Northern Pacific grant, Assistant Attorney General Campbell quoted at length from the *Townsend* case and concluded (*Missouri, Kansas and Texas Ry. Co.,* 33 L. D. 470, 471–472 (1905)):

> It will thus be seen that the fee granted the company for its right of way is subject to the conditions expressed in the act and also to those necessarily implied, namely, that it should be used for the purposes designated—that is, for the purpose of maintaining the railroad—and I am clear that under this grant the company is not invested with the right to lease any portion of its right of way for the purposes named in the contract submitted for my consideration. I have therefore to advise that said contract is invalid.

The same view was reiterated a year later when a similar problem as to the right to extract oil from the right of way arose. *Missouri, Kansas and Texas Ry. Co.,* 34 L. D. 504.

More recently, in *Use of Railroad Right of Way for Extracting Oil,* 56 I. D. 206, the Department of the Interior considered the question of the rights of the Great Northern Railway Company in oil underlying its right of way acquired under the 1875 right of way statute. It ruled that, although the company had a

"limited fee" in the right of way, it had no right to use any portion of it for the purpose of drilling for and removing subsurface oil." The opinion is exhaustive and well reasoned. It relied heavily on the decision in *Northern Pacific Ry.* v. *Townsend, supra,* stating (56 I. D. at p. 211):

> It is clear, therefore, from the foregoing decision that any use of a railroad right of way, or any portion thereof, for other than railroad purposes is prohibited. A right of way granted by Congress through the public domain may be used only and exclusively for railroad purposes. And this is true irrespective of whether the use of a portion of the right of way for other purposes interferes with the continued operation of the railroad, since it must be presumed that the entire right of way is essential for railroad purposes. The case of *Northern Pacific Ry.* v. *Townsend, supra,* is susceptible of no other meaning.
>
> That the proposed use by the Great Northern Railway Company of a portion of its right of

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[17] The fact that the Great Northern Railway was later held by this Court to have but an easement in no way detracts from the force of the administrative construction. As pointed out in the *Great Northern* case (315 U. S. at p. 276), this Court had in 1915 erroneously characterized a right of way acquired under the 1875 Act as a limited fee (*Rio Grande Ry.* v. *Stringham*, 239 U. S. 44, 47), and after that date "administrative construction bowed to the [*Stringham*] case." Thus, after 1915 and prior to this Court's decision in the *Great Northern* case which rectified the earlier error, the Department of the Interior dealt with 1875 Act rights of way as if they were, like the land-grant rights of way, "limited fees." For that reason, the administrative decision on the *Great Northern's* rights reflects the departmental view as to the extent of a railroad's "limited fee" in the right of way.

> way for the purpose of drilling for oil underlying the right of way would contravene the manifest intention of Congress, is plain. No distinction is perceived between the use [of] a portion of a right of way by a homesteader for the purpose of cultivation and the use by the railroad for the purpose of drilling an oil well. If the one use is prohibited, the other must also fall. Both uses suffer from the same vice; neither are for railroad purposes.

This administrative interpretation, consistently followed over an unusually long period of time, that the "limited fees" of railroads in their land-grant rights of way do not carry the right of underlying minerals, has been carried forward in the cases of *State of Wyoming*, 58 I. D. 128, and *Northern Pacific Railroad Co.*, 58 I. D. 160.

To this it may be added that the administrative interpretation has been endorsed by Congress. In Section 1 of the Act of May 21, 1930, ch. 307, Sec. 1, 46 Stat. 373, 30 U. S. C. 301, the Secretary of the Interior is authorized "to lease deposits of oil and gas in or under lands embraced in railroad or other rights of way acquired under any law of the United States, whether the same be a base fee or a mere easement." This demonstrates that Congress was aware of the "limited fee" decisions upon which respondent relies and understood that such a "limited fee" did not attach to the minerals which still remain in the Government. We do not of course suggest that this statute is controlling, but the clear expression of opinion by two of the three coordinate branches of the Govern-

ment on the very question here at issue will be given proper weight by this Court. *Great Northern Ry. Co.* v. *United States,* 315 U. S. 262, 276–277.[18]

CONCLUSION

We have shown in Point I that Congress intended to reserve all minerals, including those under the railroad right of way, from the grant to the Union Pacific; that such reservation was in accord with the general policy of Congress at the time in dealing with mineral interests in the public domain; and that, even if that purpose had been less clear, the proper rule of construction of Government grants compels a holding that the minerals were reserved to the United States. In Point II, we have shown that previous decisions relating to the technical nature of the title in the right of way conveyed to railroads in the same position as the Union Pacific do not support the conclusion that the ownership of the minerals was transferred to the railroad; and also that the position we advance has the support of long administrative and congressional interpretation. It follows that the Court of Appeals erred in refusing to confirm the ownership of the United States.

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[18] The Court has said (*United States* v. *Freeman,* 3 How. 556, 564–565):

> * * * if it can be gathered from a subsequent statute *in pari materia,* what meaning the legislature attached to the words of a former statute, they will amount to a legislative declaration of its meaning, and will govern the construction of the first statute.

Or, as the Ninth Circuit has tersely put it, "the legislative construction of its own act is always potent." *McFadden* v. *Mountain View Min. & Mill. Co.,* 97 Fed. 670, 677.

It is respectfully submitted that the judgment should be reversed and the cause remanded with directions to enter judgment in favor of the United States.

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DECEMBER 1956.

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IN THE

Supreme Court of the United States

October Term, 1956

No. [redacted]97

UNITED STATES OF AMERICA, PETITIONER,

vs.

UNION PACIFIC RAILROAD COMPANY.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

BRIEF IN OPPOSITION.

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IN THE

Supreme Court of the United States

October Term, 1955.

No. 957.

UNITED STATES OF AMERICA, PETITIONER,

vs.

UNION PACIFIC RAILROAD COMPANY.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

BRIEF IN OPPOSITION.

Opinions Below.

The opinion of the District Court [R. 8-12] is reported at 126 F. Supp. 646. The opinion of the Court of Appeals (Pet. App. A, pp. 16-25) is reported at 230 F. 2d 690.

Jurisdiction.

The judgment of the Court of Appeals (Pet. App. A, p. 26) was entered on February 24, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

Question Presented.

Was the court below correct in holding that the Act of July 1, 1862, granting Union Pacific "the right of way through the public lands . . . for the construction of said railroad and telegraph line" conveyed a limited fee which entitles the railroad to develop and take the minerals underlying the right of way.

Statute Involved.

The pertinent portions of the Act of July 1, 1862, 12 Stat. 489, are set forth in the petition, pages 2-3.

Statement.

Petitioner's statement adequately frames the legal issue before the Court in this case.

Argument.

1. The decision of the Court of Appeals is not in conflict with decisions of this Court or any other court of appeals. Indeed, petitioner asserts no such conflict. In view of the fact that nearly a century has elapsed since the right of way was granted to Union Pacific in 1862, the absence of a conflict of decision indicates that there is no pressing need for this Court to review the unanimous conclusion of the judges of the courts below.

2. The decision of the court below was clearly foreshadowed by *Great Northern Ry. Co. v. United States,* 315 U. S. 262. There, this Court comprehensively reviewed the Nineteenth Century railroad grants and concluded that the year 1871 marked a "sharp change in Congressional policy with respect to railroad grants." 315 U. S. at 275. Post-1871 right of way grants, such as those authorized by the general right of way act of 1875 which was in issue in *Great Northern,* were held to convey only easements, with the result that the underlying minerals did not pass to the grantees.

The Court recognized, however, that the pre-1871 right of way grants fall into a different category. The Court pointed out that such rights of way, including that granted to Union Pacific in the Act of July 1, 1862, have "been held to be limited fees." 315 U. S. at 273, n. 6. Indeed, the Court noted that "when Congress made outright grants to a railroad of alternate sections of public lands along the right of way" as it did in the pre-1871 grants,

"there is little reason to suppose that it intended to give only an easement in the right of way granted in the same act." 315 U. S. at 278. In view of the analysis in *Great Northern*, the court below was right in concluding that, if the Supreme Court had "been considering right of way grants made prior to 1871, it would have followed the 'limited fee' cases and held that such title carried with it the right to remove the minerals" (Pet. App. A, p. 23).

The significance of *Great Northern* as well as the correctness of the decision of the court below is shown by the only other Court of Appeals decision involving the right to minerals under a pre-1871 right of way, *United States v. Illinois Central R. Co.*, 187 F. 2d 374 (7th Cir. 1951), affirming 89 F. Supp. 17 (E. D. Ill. 1949). The Illinois Central right of way grant was made in 1850 and was identical in all pertinent respects to the Union Pacific right of way grant. In *Illinois Central*, the Court of Appeals unanimously affirmed the District Court which had held, on the authority of *Great Northern* and earlier decisions of this Court, that the railroad was entitled to take the minerals underlying its right of way.

3. The decision of the court below is so clearly correct as not to warrant review in this Court. The conclusion that the pre-1871 right of way grants conveyed a limited fee is firmly established by decisions of this Court. *Northern Pacific Ry. Co. v. Townsend*, 190 U. S. 267, 271 (1864 right of way grant to Northern Pacific conveyed "limited fee"); see *Missouri, Kansas & Texas Ry. Co. v. Roberts*, 152 U. S. 114, 117 (1866 right of way grant "was absolute in terms, covering both the fee and possession"); *New Mexico v. United States Trust Co.*, 172 U. S. 171 (1866 right of way grant to Atlantic and

Pacific Railroad held to be a fee, not an easement);* *Clairmont v. United States,* 225 U. S. 551, 556 (by 1864 grant, Northern Pacific "obtained the fee in the land constituting the 'right of way'"). Moreover, in *Union Pacific R. Co. v. Snow,* 231 U. S. 204, and *Union Pacific R. Co. v. Sides,* 231 U. S. 213, this Court upheld state court judgments which decreed that under its 1862 grant Union Pacific is "the owner in fee and entitled to the possession of each and every part" of its right of way.**

The nature of the pre-1871 right of way grants was explained in *Townsend* where the Court said that the grant was "made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted" and that "the land had been conveyed in terms to have and to hold the same so long as it was used for the railroad right of way." 190 U. S. at 271. Similarly, in *Railroad Company v. Baldwin,* 103 U. S. 426, 429-430, which involved the right of way granted in 1866 to the St. Joseph & Denver City Railroad, the Court said that "It is a present absolute grant, subject to no conditions except those necessarily implied, such as that the road shall be constructed and used for the purposes designed." These cases show that peti-

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*In the *New Mexico* case, the Court pointed out that the term "right of way" does not necessarily mean the right of passage only, and that when applied to railroads, it is frequently used to describe the strip of land upon which the railroad is constructed, which may be owned in fee. 172 U. S. at 181-182.

**The trial court judgments in the *Snow* and *Sides* cases, while not set forth in this Court's opinions, were contained in the records on appeal and were thus before the Court. *Union Pacific R. Co. v. Snow* [R. 16]; *Union Pacific R. Co. v. Sides* [R. 16].

tioner is incorrect in asserting (p. 8 n.) that "this Court has never stated to what extent the 'fee' is limited." They demonstrate, on the contrary, that the term "limited fee" (or its equivalent, a base, qualified or determinable fee) was used by the courts in accordance with its definite and long established meaning to refer to an estate in fee simple which will continue until the occurrence of a stated event, at which time the estate may revert to the grantor. See Kent's Commentaries (12th ed. 1873), Vol. 4, p. 10; Blackstone's Commentaries (9th ed. 1783), Vol. 2, pp. 109-110; Restatement of Property, Sec. 23, Illus. 4.

As the Court of Appeals correctly held, the owner of such a limited fee, so long as the estate exists, has the same rights as an owner in fee simple and may remove the underlying minerals. *E. g., United States v. Illinois Central R. Co.*, 89 F. Supp. 17 (E. D. Ill. 1949), aff'd, 187 F. 2d 374 (7th Cir. 1951); *Davis v. Skipper*, 125 Tex. 364, 83 S. W. 2d 318 (1935); see *Johnson Irrigation Co. v. Ivory*, 46 Wyo. 221, 24 P. 2d 1053, 1058 (1933); Restatement of Property, Sec. 193, Comment h; 19 Am. Jur., Estates, Secs. 28, 30, 31. Petitioner's attempt (p. 6) to discount this rule as one of the "technicalities of private real estate law" is refuted by decisions of this Court which established the limited fee principle. The consequences which flow from the nature of the estate held by Union Pacific are decisive here, just as they were in such cases as *New Mexico v. United States Trust Co.*, 172 U. S. 171, where exemption from taxation was the consequence of the holding that the right of way was

granted in fee, and *Northern Pacific Ry. Co. v. Townsend*, 190 U. S. 267, where the nature of the railroad's limited fee estate was held to prevent adverse possession.*

Petitioner's suggestion (p. 6) that the limited fee cases are somehow inapplicable because the United States was not a party** overlooks the fact that these decisions construing federal statutes are based on legal principles which apply to the United States as well as private parties. There are, of course, special doctrines favoring the United States in particular instances,*** but there is no basis for a suggestion that the United States is governed only by those legal principles which happen to have been established or applied in cases in which it was a party.

Petitioner's further argument (pp. 6-7) that the limited fee cases can be ignored because minerals were not in issue is answered in the *New Mexico* case, 172 U. S. at 182, where the Court, referring to the *Roberts* case,

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*Petitioner's reliance (p. 11) on administrative rulings to limit the well-settled incidents of a limited fee estate is not persuasive in view of the total absence of case support and the 43-year gap between passage of the statute and the first administrative construction relied upon. Moreover, the self-serving Interior Department rulings are entitled to no greater weight in this context than Union Pacific's long-standing practice [R. 14] of reserving mineral rights when subleasing portions of the right of way. See *Fishgold v. Sullivan Drydock & Repair Corp.*, 154 F. 2d 785, 789 (2d Cir. 1946), aff'd, 328 U. S. 275. The 1930 Act of Congress relied upon by petitioner (p. 11) is even further removed from the 1862 grant than the administrative rulings, and it, too, is a "self-serving declaration." *Great Northern Ry. Co. v. United States*, 119 F. 2d 821, 827 (9th Cir. 1941), aff'd, 315 U. S. 262.

**The United States, of course, was a party in the *Great Northern* case, 315 U. S. 262, and the *Illinois Central* case, 187 F. 2d 374 (7th Cir. 1951), in which the limited fee principle was reiterated.

***See Hart and Wechsler, The Federal Courts and the Federal System (1953), pp. 1122-1125.

152 U. S. 114, said that "The difference between an easement and the fee would not have escaped his [Mr. Justice Field's] attention and that of the whole court, with the inevitable result of committing it to the consequences which might depend on such difference." Indeed, as the Court of Appeals said, "the Supreme Court had a clear understanding of the accepted meaning of the terms 'easement,' 'right of way,' 'limited fee,' and 'fee title' " (Pet. App. A, p. 19), and it used such terms with a discriminating appreciation of their consequences.

The congressional policy reflected in the railroad grants prior to 1871 is explained, as the Court of Appeals emphasized, by the fact that during that period "it was considered of utmost national importance that a railroad be constructed to the west coast of the United States" (Pet. App. A, p. 19). Thus, when the consideration offered by the 1862 Union Pacific Act did not induce investors to undertake the project—which was then considered extremely hazardous—Congress promptly increased the aid offered. See Sec. 4 of the Act of July 2, 1864, 13 Stat. 356. In view of the circumstances which existed when the 1862 Act was passed,* it is not surprising that the Supreme Court has stated that the grants made by that Act are not to be regarded as "bestowing bounty on the railroad" or as a "gratuitous reward," but rather as consideration earned as a result of the contractual relations established by the Act. See *Nadeau v. Union Pacific R. Co.*, 253 U. S. 442, 444; *Burke v. Southern Pacific R. Co.*, 234 U. S. 669, 679-680.

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*The Court of Appeals referred to these circumstances by quoting from *United States v. Union Pacific R. Co.*, 91 U. S. 72, 79-80. See Pet. App. A, p. 20 n.

A "very important part" of that consideration was the right of way granted to the railroad. See *Railroad Company v. Baldwin*, 103 U. S. 426, 430.

4. Petitioner's principal argument (pp. 8-13) is that a "special minerals policy" makes it necessary for the Court to read into the 1862 right of way grant a reservation of the mineral rights to the United States. This argument reflects the fact—which petitioner does not dispute—that there is nothing in the Union Pacific Act which excepts either mineral rights or mineral lands from the right of way granted. While there is an exception of *mineral lands* from the grant of the alternate sections in Section 3 of the Act, petitioner concedes (p. 12) that this exception could not apply to "the right of way which had to follow a reasonably straight line" and obviously could not jump over or go around mineral lands. Thus, to support its argument, petitioner must establish that a congressional policy of granting the fee and reserving *mineral rights* was inherent though not expressed in the 1862 right of way grant.

The court below, sitting in a circuit where there is special familiarity with mineral rights problems, decisively rejected this "special minerals policy" argument on the ground that it was not until the Stock-Raising Homestead Act of December 29, 1916, 39 Stat. 862, that the congressional policy of conveying the fee and reserving minerals to the United States was fully developed (Pet. App. A, p. 25). The accuracy of this holding is shown

both by the legislative history and the historical background of the Stock-Raising Homestead Act. See 54 Cong. Rec. 687 (remarks of Congressman Mondell); *United States v. Price*, 111 F. 2d 206, 207 (10th Cir. 1940); *cf. Anderson v. McKay*, 211 F. 2d 798, 802-803 (D. C. Cir., 1954), cert. denied, 348 U. S. 836.

The Court of Appeals also pointed out that petitioner's minerals policy argument attempts to distort an alleged policy of excepting *mineral lands* from a general grant of lands into a policy of reserving *mineral rights* in lands to which a limited fee was granted (Pet. App. A, pp. 24-25).* Thus, *Mining Co. v. Consolidated Mining Co.*, 102 U. S. 167, and *United States v. Sweet*, 245 U. S. 563, cited by petitioner (pp. 9-10), pertain only to the policy of excepting mineral lands from certain land grants. Similarly, the provision in Section 3 of the Union Pacific grant referred to by petitioner (p. 10) is an exception of "mineral lands." And the portion quoted from the debate on the Act (p. 10) again relates to an exception of mineral lands, not mineral rights. Even petitioner's repeated use of the imprecise phrase "mineral wealth"

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*The important distinction between an exception of mineral lands from a grant of lands and a reservation of mineral rights in lands granted was noted in *Burke v. Southern Pacific R. Co.*, 234 U. S. 669, 683-684, where the Court, in referring to the exception of mineral lands from the grant of alternate sections adjacent to the right of way, said: "It was not a mere reservation of minerals, but an exclusion of mineral lands . . ."

(pp. 10-12) cannot bridge the gap between an exception of mineral lands and a reservation of mineral rights.*

Reference to the minerals policy prevailing in 1862 will show that the grant to the railroad of a limited fee carrying with it the right to take the minerals was fully in accord with that policy. Although there was no general statute for the disposal of mineral lands prior to the Act of July 26, 1866, 14 Stat. 251, earlier legislation dealing with specific minerals indicates that throughout the Nineteenth Century the policy was to encourage the exploration and development of mineral resources.** In accordance with this policy of encouraging mineral development, the United States "assented to the general occupation of the public lands for mining" and recognized the possessory

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*It is far from clear that even the policy of excepting mineral lands had crystallized by the time of the Union Pacific grant. *Work v. Louisiana*, 269 U. S. 250, holds that there was no policy of excepting mineral lands in 1850. The *Sweet* case, 245 U. S. 563, holds that there was such a policy at the time of the school land grant to Utah of July 16, 1894. Thus, the policy crystallized sometime between 1850 and 1894. The *Sweet* case suggests that the policy did not in fact crystallize until after 1864 by the statement that a series of Acts adopted between 1864 and 1873 "taken collectively . . . . constitute a special code" reserving mineral lands from disposition except under laws especially including them. (245 U. S. at 571.) It seems likely that a general policy with respect to exception of mineral lands became fixed no earlier than the passage of the Act of July 26, 1866, 14 Stat. 251, which was the first general legislation establishing special rules and regulations for the disposition of mineral lands.

**At first Congress sought to accomplish this by providing that the President might lease lands containing salines and lead, but this practice was abandoned at an early date in favor of disposing of these lands outright to states and private parties. Compare the Act of March 3, 1807, 2 Stat. 445, 446 (authorizing leases of lead mines and salt springs), with the Act of March 3, 1829, 4 Stat. 364 (providing for the sale of lead mines in Missouri).

rights of miners who discovered minerals on the public domain. See *Atchison v. Peterson,* 20 Wall. 507, 512; *Del Monte Mining Co. v. Last Chance Mining Co.,* 171 U. S. 55, 62. Moreover, during the Nineteenth Century it was the policy of Congress to dispose of mineral lands at nominal prices and without reserving royalty. See *Union Oil Co. v. Smith,* 249 U. S. 337, 349; *Mining Co. v. Consolidated Mining Co.,* 102 U. S. at 173.

Reflecting this policy of encouraging mineral development, this Court in *Atchison v. Peterson,* 20 Wall. 507, 512, indicated that the exception of mineral lands in certain grants was for the purpose of keeping such lands open for mineral exploration rather than having them occupied for agricultural purposes. The exception of mineral lands in the grant to Union Pacific of alternate sections adjacent to the right of way was in accordance with that purpose. However, since Union Pacific is entitled to exclusive use and possession of its right of way, the objective of keeping mineral lands open to development would not have been accomplished by reserving minerals from the right of way. On the contrary, the best way to insure the development of the mineral resources within the right of way was to grant the fee, including the minerals, to the railroad.*

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*It is an apparent *non-sequitur* to argue, as petitioner does (p. 11), that because mineral lands were excepted from the grant of alternate sections to the railroad, Congress must have intended to reserve the "mineral wealth" from the grant of the right of way.

To show that there was no policy of reserving mineral rights in 1862, the Court of Appeals properly relied on *Barden v. Northern Pacific R. Co.*, 154 U. S. 288, and *Burke v. Southern Pacific R. Co.*, 234 U. S. 669 (Pet. App. A, p. 25). In *Barden* the Court held that the exception of mineral lands from the grant of alternate sections applied to lands not known to be mineral at the time of the enacting statute but found to be mineral prior to the issuance of a patent and the passage of title. However, in *Burke* the Court held that if a patent had issued to the railroad for the alternate sections, complete title, including all minerals subsequently discovered, passed to the railroad notwithstanding the statutory exception of mineral lands.

The basic principle established by the *Barden* and *Burke* cases is that under these railroad grants, once title has passed to the railroad, the Government loses all claim to the minerals. This rule applies irrespective of whether there is a patent. The decision in *Shaw v. Kellogg*, 170 U. S. 312, makes it clear that "there is no magic in the word 'patent,'" and that where Congress makes no provision for a patent, none is essential. 170 U. S. at 341, 343. The decisive factor is whether title has passed and "in whatsoever manner that is accomplished, the same result follows as though a formal patent were issued." *Ibid.* It is settled that title to the right of way passed to the railroad at least "upon the construction of the road," if not earlier. *Missouri, Kansas, & Texas Ry. Co. v. Roberts*, 152 U. S. 114, 116; *Stuart v. Union Pacific R. R. Co.*, 227 U. S. 342. The Union Pacific Railroad was

actually constructed, as required by the act of Congress, more than 85 years ago. On a parity of reasoning to the *Barden, Burke* and *Kellogg* cases, it follows that when title to the right of way passed to the railroad, the title included the minerals and was not subject to any implied reservation of mineral rights.

Conclusion.

The petition for writ of certiorari should be denied.

Respectfully submitted,

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Opinions Below.

The opinion of the Court of Appeals [R. 18-24] is reported at 230 F. 2d 690. The opinion of the District Court [R. 7-11] is reported at 126 F. Supp. 646.

Jurisdiction.

The judgment of the Court of Appeals [R. 24] was entered on February 24, 1956. The petition for a writ of certiorari was filed on May 21, 1956, and was granted on October 8, 1956 [R. 24; 352 U. S. 818]. The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

Question Presented.

Was the court below correct in holding that the Act of July 1, 1862, 12 Stat. 489, granting Union Pacific "the right of way through the public lands . . . for the construction of said railroad and telegraph line," conveyed a limited fee which entitles the railroad to develop and take the minerals within the right of way?

Statute Involved.

The pertinent portions of the Act of July 1, 1862, 12 Stat. 489, and of the Act of July 2, 1864, 13 Stat. 356, are set forth in an appendix to this brief.

Statement.

The material facts are not in dispute. Petitioner's statement adequately frames the legal issue before the Court in this case.

The District Court entered judgment for Union Pacific on January 14, 1955 [R. 14]. The court held that by the Act of July 1, 1862, the United States granted to Union Pacific a limited fee in the lands comprising the right of way by which the company acquired the "sole right" to the subsurface oil, gas, and other minerals [R. 13-14]. The court found as a fact that Union Pacific's proposed development of the minerals would "in no way interfere with the use of the right of way for railroad and telegraph purposes" [R. 13], and concluded that Union Pacific may engage in such operations "so long as they do not interfere with the primary purpose of the grant" [R. 14].

The Court of Appeals for the Tenth Circuit unanimously affirmed on February 24, 1956 [R. 24]. In up-

holding Union Pacific's right to take the minerals within the right of way, the court relied on a long line of Supreme Court decisions which held that "considering the time and the circumstances under which these grants were made, Congress intended to convey a limited fee" [R. 19]. The court found that "The governmental policy in effect at the time of the Union Pacific grant, was that a grant or conveyance by the United States carried with it the full title, including minerals" [R. 23]. The court rejected the United States' assertion that it was the federal policy prior to 1871 to reserve mineral rights in public land grants and held that such a policy was not fully developed until 1916 [R. 23-24].

Summary of Argument.

I.

The history of railroad land grants makes it clear that the right of way granted to Union Pacific by the 1862 Act was "the land itself" and not a mere "right of passage" or "easement." This history, which was summarized and relied upon in *Great Northern Ry. Co. v. United States*, 315 U. S. 262, shows that the year 1871 marks the end of an era in congressional policy with respect to grants for the construction of railroads. Prior to 1871 Congress made extensive outright grants of alternate sections ("place lands") adjacent to the rights of way to encourage the construction of transcontinental railroads, and the rights of way granted during that period, including the Union Pacific right of way, were "limited fees" in the land itself. That this was the nature of the pre-1871 rights of way was pointed out by the Court in *Great Northern*, 315 U. S. at 273 n. 6, and candidly recog-

nized by the Government in its brief in *Great Northern* (p. 16). However, after the sharp change in congressional policy in 1871, outright grants of "place lands" along the rights of way were discontinued and the rights of way granted after that date were, as the Court held in *Great Northern*, only rights of passage or easements.

The provisions of the 1862 Act reflect the fact that it was the product of a different era from the post-1871 legislation and that it conveyed a limited fee in the lands comprising the right of way. Section 2 provides that the grant is for a stated purpose (the construction of a railroad and telegraph line), and such a grant ordinarily conveys a fee, not a lesser estate. The provision of Section 6 that the grant is "on condition" that the railroad must be kept in repair and use shows that the fee was limited or defeasible in nature. The fact that the Act granted a "limited fee" in the land is borne out by the provision of Section 2 requiring the United States to extinguish Indian titles to the right of way lands. Moreover, the granting language in Section 2 is closely similar to that in Section 3 granting "place lands" which concededly were granted in fee. The nature of the Union Pacific grant is also illumined by the fact that in the 1862 Act, there is no counterpart of provisions of the 1875 Act upon which the Court relied in holding the right of way involved in *Great Northern* to be an easement.

A long line of decisions of this Court hold that the pre-1871 right of way grants conveyed a limited fee. *Northern Pacific Ry. Co. v. Townsend*, 190 U. S. 267, 271, the leading case in this series, emphasizes that under an 1864 Act closely similar to the Union Pacific Act, the Northern Pacific right of way was granted "just as

though the land had been conveyed in terms to have and to hold the same so long as it was used for the railroad right of way." As early as 1880 the Court held in *Railroad Company v. Baldwin,* 103 U. S. 426, 429, that a right of way granted in 1866 was "a present absolute grant, subject to no conditions except those necessarily implied, such as that the road shall be constructed and used for the purposes designed."

It is well settled that a holder of a limited or defeasible fee has, so long as the estate continues, the same rights as an owner in fee simple absolute to take the minerals. Both under federal and state law, this rule is uniformly recognized, and the law of Wyoming, where the right of way involved here is located, is in accord. No canon of construction overcomes this settled principle of law under which Union Pacific is entitled to take the minerals within the right of way.

The terms of the grant in this case make it clear that the right of way may be used for any purpose which does not interfere with railroad operations. The grant is not limited to uses "necessary" for the construction of the railroad, as was the case in *Caldwell v. United States,* 250 U. S. 14, which is relied upon by petitioner. The use of portions of railroad rights of way for non-railroad purposes which do not interfere with railroad operations is widespread, and the courts have regularly approved it. The trial court found, and petitioner does not challenge, that Union Pacific's proposed oil operations will in no way interfere with the use of the right of way for railroad and telegraph purposes.

II.

A congressional policy of reserving the mineral rights from federal land grants which petitioner seeks to apply to the 1862 right of way grant was in fact not adopted until after the beginning of the twentieth century. Examination of congressional action and official statements subsequent to 1900 establishes beyond doubt that the separation of the mineral rights from the surface was a "new concept" which was first employed in 1909. Petitioner's argument with respect to mineral policy amounts to an unwarranted attempt to distort an alleged policy of excepting mineral lands into the entirely different policy of reserving mineral rights.

The federal mineral policy actually operative in 1862 supports Union Pacific's right to the minerals. The objective of the Federal Government at that time was to encourage the rapid development of mineral resources. To accomplish this Congress made mineral lands freely available at nominal prices. The policy of segregating mineral lands from agricultural lands in the grants of "place lands" to railroads was for the purpose of keeping such lands open for rapid mineral development. Thus the policy which was in effect in 1862 shows that Congress had no intention of locking up and reserving for the United States the minerals within the right of way. On the contrary, since Union Pacific was entitled to exclusive use and possession of its right of way, the best way to implement the federal policy of encouraging mineral development was to grant the railroad a limited fee in its

right of way, including the right to take the minerals. Union Pacific's position is buttressed by *Burke v. Southern Pacific R. Co.*, 234 U. S. 669, which indicates that when the title to the right of way passed to the company, upon construction of the railroad, there could be no reservation of minerals in the United States.

The legislative history of the 1862 Act also shows that there is no basis for implying a reservation of mineral rights in the right of way grant. Although a reservation of mineral rights in the "place land" grant was proposed by Representative Cradlebaugh, it was rejected because mineral lands were already excepted from the place land grant and because a reservation of mineral rights in the lands granted would have involved a radical change in the policy of the Government in effect at that time. Decisions of this Court and the provisions of the Act make it clear that the exception of mineral lands in Section 3 of the Act applies only to the place land grant and does not apply to the right of way. Petitioner recognizes that this exception of mineral lands could not be applied to the right of way which had to follow a reasonably straight line and could not jump over and go around mineral lands.

Neither the administrative nor the legislative construction of the 1862 Act affords any basis for holding that the mineral rights within the right of way did not pass to the railroad.

ARGUMENT.

I.

Union Pacific Is Entitled to Take the Minerals in the Right of Way Lands Granted by Section 2 of the Act of July 1, 1862.

A. The 1862 Act Conveyed a Limited Fee in the Lands Comprising the Right of Way.

Congress, by Section 2 of the Act of July 1, 1862, 12 Stat. 489, provided that a "right of way through the public lands be, and the same is hereby, granted to said company [Union Pacific's predecessor] for the construction of said railroad and telegraph line." In *New Mexico v. United States Trust Co.*, 172 U. S. 171, 182, this Court explained that the phrase "right of way" may be used to describe either (1) a "right of passage" amounting to an "ordinary easement," or (2) "the land itself."* The two ways in which the phrase may be used are also clearly stated in *Joy v. St. Louis*, 138 U. S. 1, 44, as follows:

> "Now, the term 'right of way' has a twofold signification. It sometimes is used to describe a right belonging to a party, a right of passage over any tract; and it is also used to describe that strip of land which railroad companies take upon which to construct their road-bed."

The right of way granted to Union Pacific by the Act of July 1, 1862, was "the land itself.". This is made clear

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*The *New Mexico* case, which is discussed pages 23-25, *infra*, holds that the 1866 right of way grant to the Atlantic and Pacific R. Co., which is similar to the Union Pacific grant, conveyed a fee in the land itself, not a mere right of passage.

by (1) the history of railroad grants in the nineteenth century, (2) the provisions of the 1862 Act, and (3) prior decisions of this Court.

1. The History of the Nineteenth Century Railroad Grants Indicates That the 1862 Act Granted Union Pacific a Limited Fee in the Right of Way Lands.

The following concise and candid statement of the history of railroad land grants is quoted from the brief for the United States (pp. 15-16) in *Great Northern Ry. Co. v. United States*, 315 U. S. 262, in which the Court held that rights of way granted under the 1875 General Right of Way Act, 18 Stat. 482, are easements:

> "The year 1871 marks the end of one era and the beginning of a new in American land-grant history. In that year the policy of lavish grants of land to encourage railroad construction was replaced by a new policy of severe restriction of federal munificence in respect of railroads. It is in the light of this shift that the Act of 1875 must be read, for it is well recognized that railroad grants 'are to receive such a construction as will carry out the intent of Congress,' and to ascertain that intent courts 'must look to the condition of the country when the acts were passed.' *Winona & St. Peter R. R. Co. v. Barney*, 113 U. S. 618, 625; *United States v. Denver &c. Railway*, 150 U. S. 1, 14; *Minidoka & S. W. R. Co. v. Weymouth*, 19 Idaho 234 (1911). 'Courts, in construing a statute, may with propriety recur to the history of the times when it was passed.' *United States v. Union Pacific R. R. Co.*, 91 U. S. 72, 79; *Smith v. Townsend*, 148 U. S. 490, 494.
>
> "That there was a marked change in land-grant policy in 1871 is not open to dispute. The first important grant of public lands for railroad pur-

poses was made to the Illinois Central in 1850.* During the next two decades 'there passed into the hands of western railroad promoters and builders a total of 158,293,000 acres, an area equalling that of the New England states, New York, and Pennsylvania combined.'** The largest of these grants (40,000,000 acres) was made to the Northern Pacific Railroad Company by the Act of July 2, 1864, c. 217, 13 Stat. 365. That Act, in addition to providing a 400-foot right of way from Lake Superior to Puget Sound, also granted the alternate odd-numbered sections of public lands for 40 miles on each side of the railroad, with indemnity provisions for lands already sold, homesteaded, pre-empted, or otherwise disposed of. It is thus apparent that Congress in 1864 was willing to grant lands in 'almost any amount'*** to encourage the construction of transcontinental railroads. Faced with such an open-handed congressional policy, the courts have construed such early grants as conveying to the railroads a fee in their rights of way."****

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*"Act of September 20, 1850, c. 61, 9 Stat. 466."

**" 'Land Grants,' 9 Encyclopaedia of the Social Sciences (1933), p. 35."

***"Statement by Representative Thaddeus Stevens during the debates on the Northern Pacific Bill, Cong. Globe, 38th Cong., 1st sess., 1698 (1864)."

****"*Northern Pacific Ry. v. Townsend*, 190 U. S. 267, 271."

The foregoing historical material, and especially the change in policy in 1871, was extensively relied upon in the *Great Northern* decision. The Court stated that "Beginning in 1850, Congress embarked on a policy of subsidizing railroad construction by lavish grants from the

public domain," but that "After 1871 outright grants of public lands to private railroad companies seem to have been discontinued." 315 U. S. at 273-274. The Court held that the Right of Way Act of 1875 was "a product of the sharp change in Congressional policy with respect to railroad grants" and therefore that it was "improbable that Congress intended by it to grant more than a right of passage." 315 U. S. at 275.

The Court noted that the 1862 Union Pacific grant was "typical" of the pre-1871 grants. 315 U. S. at 273, n. 6. The rights of way conveyed in such acts, the Court said, "have been held to be limited fees." *Ibid.* The Court reasoned that since in the pre-1871 period "Congress made outright grants to a railroad of alternate sections of public lands along the right of way, there is little reason to suppose that it intended to give only an easement in the right of way granted in the same Act."* 315 U. S. at 278. The Court referred to cases holding that the pre-1871 right of way grants were limited fees, but said that they were inapplicable to the 1875 Act because they "deal with rights of way conveyed by land-grant acts before the shift in congressional policy occurred in 1871." *Ibid.*

Brief reference to the circumstances which impelled enactment of the Union Pacific Act in 1862 provides persuasive evidence that the right of way granted therein should not be lumped together with those granted after

*In concrete terms, since Congress granted in fee to Union Pacific alternate sections ("place lands") adjacent to the right of way amounting to 12,800 acres per mile of railroad, there is little reason to suppose that Congress would in the same Act decline to grant in fee the right of way which contains only some 50 acres per mile.

1871. Indeed, this Court in *United States v. Union Pacific R. Co.*, 91 U. S. 72, 79, emphasized that,

> "Many of the provisions in the original act of 1862 are outside of the usual course of legislative action concerning grants to railroads, and cannot be properly construed without reference to the circumstances which existed when it was passed."

There is no better picture of those circumstances than that sketched by the Court in that case as follows:*

> ". . . The war of the rebellion was in progress; and, owing to complications with England, the country had become alarmed for the safety of our Pacific possessions. . . . . It is true, the threatened danger was happily averted; but wisdom pointed out the necessity of making suitable provisions for the future. This could be done in no better way than by the construction of a railroad across the continent. . . .
>
> ". . . Although this road was a military necessity, there were other reasons active at the time in producing an opinion for its completion besides the protection of an exposed frontier. There was a vast unpeopled territory lying between the Missouri and Sacramento Rivers which was practically worthless without the facilities afforded by a railroad for the transportation of persons and property. With its construction, the agricultural and mineral resources of this territory could be developed, settlements made where settlements were possible, and thereby the wealth and power of the United States largely in-

*The background of the Union Pacific Acts was also well summarized less than a year ago in *Thomas v. Union Pacific R. Co.*, 139 F. Supp. 588, 591-592 (D. Colo. 1956), aff'd, ... F. 2d ..... (10th Cir., Dec. 24, 1956).

creased; and there was also the pressing want, in time of peace even, of an improved and cheaper method for the transportation of the mails, and of supplies for the army and the Indians.

"It was in the presence of these facts that Congress undertook to deal with the subject of this railroad. The difficulties in the way of building it were great, and by many intelligent persons considered insurmountable." 91 U. S. at 79-80.

In contrast to the 1875 Act, the 1862 Act was in effect a proposal addressed by the Government to the prospective investors named therein and to others who, it was hoped, could be induced to join in the hazardous enterprise of constructing a railroad to the Pacific Ocean. *Cf. United States v. Northern Pacific Ry. Co.*, 256 U. S. 51, 63-64. Congress was not only willing but anxious to provide whatever was necessary by way of inducement. It is this background which has caused the Court to emphasize that the grants made by the 1862 Act, including the right of way, are not to be regarded as "bestowing bounty on the railroad" or as a "gratuitous reward" but rather as something earned by compliance with the Act. *Nadeau v. Union Pacific R. Co.*, 253 U. S. 442, 444; see *Burke v. Southern Pacific R. Co.*, 234 U. S. 669, 679-680.

The historical background and the change in policy in 1871 are as decisive here as they were in *Great Northern*. Just as the developments after 1871 led the Court to hold that the 1875 Act granted only an easement, so the pre-1871 circumstances show that the 1862 grant to Union Pacific conveyed a limited fee in the lands comprising the right of way.

2. The 1862 Act, and Its Contrast With the 1875 Act, Show That a Limited Fee in the Land Itself Was Granted to Union Pacific.

The provisions of the 1862 Act reflect the fact that it was the product of a different era from the post-1871 Acts. Section 2 of the 1862 Union Pacific Act provides that "the right of way . . . is . . . granted . . . for the construction of said railroad and telegraph line." It is hornbook law that a "grant" for a stated purpose ordinarily conveys a fee simple, not a lesser estate. Am. Jur., Estates, §71; C. J. S., Estates, §10. This principle was applied in *Wright v. Morgan*, 191 U. S. 55, where the Court held that an Act granting the City of Denver certain lands "for a cemetery" conveyed a "fee simple absolute." Mr. Justice Holmes, for the Court, emphasized that the statement of purpose "did not restrict the ordinary incidents of title." 191 U. S. at 58.

The statement of purpose in Section 2 of the Union Pacific Act is supplemented by the provision in Section 6 to the effect that the grant is made "upon condition" that the company "shall keep said railroad and telegraph line in repair and use." Such words of condition are commonly used in the creation of a limited or defeasible fee in land. Restatement, Property, §45; Simes and Smith, The Law of Future Interests, §§247, 286 (2d ed. 1956). The effect of the grant and the condition is "just as though the land had been conveyed in terms to have and to hold the same so long as it was used for the railroad right of way." *Cf. Northern Pacific Ry. Co. v. Townsend*, 190 U. S. 267, 271. There is no similar condition in the 1875 Act under which the right of way was held to be an easement in *Great Northern*.

Section 2 of the Union Pacific Act provides that "The United States shall extinguish as rapidly as may be the

Indian titles to all lands falling under the operation of this act and required for the said right of way and grants hereinafter made." A typical example of the operation of such a provision may be seen in *Clairmont v. United States*, 225 U. S. 551, 555-556, where the Flathead Indians by agreement relinquished to the United States all the "right, title, and interest" in a portion of the Northern Pacific right of way.* The existence of this provision in the 1862 Act and the absence of a similar provision in the 1875 Act indicate that in the earlier Act, it was the purpose of Congress to extinguish other claims and grant the railroad the entire interest in the lands comprising the right of way so long as railroad operations continue.

Equally significant are provisions of the 1875 Act which have no counterpart in the 1862 grant to Union Pacific. The Court in *Great Northern* found especially persuasive the fact that Section 4 of the 1875 Act requires the location of each right of way to be noted on the plats in the local land office and provides that "thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way." 315 U. S. at 271. The Court reasoned that the provision for disposal of the land subject to the right of way is wholly inconsistent with the right of way being deemed a limited fee. The absence of a comparable provision in the 1862 Act serves to "illumine the nature of the right of way granted," just as its presence did in *Great Northern*, 315 U. S. at 272.

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*In the *Clairmont* case, discussed at p. 25, *infra*, the Court held that under the 1864 Northern Pacific right of way grant, 13 Stat. 365, the "railroad company obtained the fee in the land constituting the 'right of way.'"

In *Great Northern* the Court further relied upon the fact that Section 2 of the 1875 Act declares that any railroad whose right of way passes through a canyon, pass, or defile "shall not prevent any other railroad company from the *use and occupancy* of said canyon, pass, or defile, for the purposes of its road, *in common* with the road first located."* 315 U. S. at 271. Once again, the 1862 Union Pacific grant contains no such provision.

Likewise relevant is the fact that the granting language of Section 2 of the 1862 Act is closely similar to that of Section 3 of that Act which provides:

> "And be it further enacted, That there be, and is hereby, granted to the said company, for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores thereon, every alternate section of public land, . . ."

There is no doubt but that Section 3 granted a fee in the land itself (see *Burke v. Southern Pacific R. Co.*, 234 U. S. 669, 710) and petitioner recognizes this fact (Br. p. 27).** It follows that the right of way granted was the land itself, not a mere easement.

Petitioner attempts to distinguish the Section 3 grant from that made in Section 2 by arguing that the purpose of Section 3 was to provide "financial aid" while the purpose of Section 2 was only to provide a "physical situs for the location of the tracks and necessary appurtenances" (Br. pp. 14-16). There is no basis, however, for the

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*The emphasis in this quotation appears in the Court's opinion.

**The effect of the exception of mineral lands from the lands granted by Section 3 is discussed at pp. 58-60, *infra*.

petitioner's arbitrary assumption that the purpose of Section 2 was limited to providing a right of passage. On the contrary, this Court has itself emphasized that "the right of way for the whole distance of the proposed route was a very important part of the aid given." *Railroad Company v. Baldwin*, 103 U. S. 426, 430. That Section 2 has this broader purpose was reiterated with respect to the very right of way involved here in *Union Pacific R. Co. v. Laramie Stock Yards*, 231 U. S. 190, 198.

Petitioner also suggests, in the light of hindsight, that Congress "erred in too lavishly dispensing non-mineral 'place lands,' or in overestimating the amount of subsidy needed to construct the road," and petitioner claims that the error would be "compounded" by affirmance of the Court below (Br. p. 44). Even if petitioner were right in its allegation of lavishness, "No argument can be drawn from the wisdom that comes after the fact." *United States v. Union Pacific R. Co.*, 91 U. S. at 81. But certain it is that the consideration did not seem overgenerous at the time of the grant. On the contrary, it was not generous enough to induce investors to venture their money in such a hazardous enterprise. And so, after two years of unsuccessful efforts to raise the required funds, the railroad was offered increased aid by Section 4 of the amendatory Act of July 2, 1864, 13 Stat. 356.* Petitioner's argument that the consideration was too lavish was effectively answered nearly three-quarters

*Petitioner states (Br. p. 5) that the 1864 amendments do not affect the question here presented, but this amendment, which doubled the number of alternate sections granted in aid of construction, shows vividly the extent to which Congress was willing to go in offering inducement to obtain construction of a railroad to the Pacific Coast.

of a century ago in the Report for the year 1883 of the Government Directors of the Union Pacific Railway Company (the predecessor of the present company):

> "In discussing the magnificence of this gift from the Government as if there were no consideration for it, and the men who obtained it had in some way gained an unfair advantage, the conditions existing at the time it was made are lost sight of, and the circumstances attending it too often forgotten. . . . It should be remembered . . . that the condition upon which it was made, to wit, the building of the Pacific Railroad, was generally believed to be so improbable of fulfillment as practically to make it void and of no effect. The projectors of the road were at that time objects rather of sympathy as the victims of visionary speculations than of envy on account of their advantageous bargain." House Ex. Doc. No. 83, 48th Cong., 1st Sess., p. 17.

3. Decisions of This Court Establish That the 1862 Right of Way Grant Is a Limited Fee.

The rule that the pre-1871 right of way grants conveyed a limited fee is established in a long line of decisions of this Court which have discussed the nature of such grants. These decisions have decisive importance in resolving the question presented here because the legal terms they use to define the nature of the railroad's interest are words of art which have a definite and well-established meaning. The Court's statement in *Morissette v. United States*, 342 U. S. 246, 263, though made with reference to an Act of Congress, is even more pertinent as applied to decisions of this Court:

> ". . . And where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows

and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. . . ."

Perhaps the leading case establishing the nature of the railroad's interest in the rights of way granted prior to 1871 is *Northern Pacific Ry. Co. v. Townsend*, 190 U. S. 267. This case involved a portion of the right of way granted to the Northern Pacific under the Act of July 2, 1864, 13 Stat. 365, an act practically identical to the Union Pacific Act of 1862. The basic issue in this case was whether "an asserted title by adverse possession can be made efficacious" with respect to the right of way. 190 U. S. at 270. The answer to this question was held to depend on the nature and effect of the Act of Congress granting the right of way. On this point the Court first held that Congress granted a fee in the lands comprising the right of way:

> "Following decisions of this court construing grants of rights of way similar in tenor to the grant now being considered, *New Mexico v. United States Trust Co.*, 172 U. S. 171, 181; *St. Joseph & Denver City R. R. Co. v. Baldwin*, 103 U. S. 426, it must be held that the fee passed by the grant made in Section 2 of the act of July 2, 1864." 190 U. S. at 271.

The Court went on to define specifically the implied condition of reverter which may limit the duration of the grant and which thus causes the fee to be limited or defeasible:

> ". . . But, although there was a present grant, it was yet subject to conditions expressly stated in the act, and also (to quote the language of the *Bald-*

> *win* case) 'to those necessarily implied, such as that the road shall be . . . used for the purposes designed.' . . . The substantial consideration inducing the grant was the perpetual use of the land for the legitimate purposes of the railroad, just as though the land had been conveyed in terms to have and to hold the same so long as it was used for the railroad right of way. *In effect the grant was of a limited fee, made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted."** 190 U. S. at 271.

Petitioner attempts to discount the *Townsend* case by claiming that "it was hardly necessary to reach the question of the precise nature of the railroad's interest in the right of way" in that decision (Br. p. 34). The Court, however, thought otherwise. After defining the interest of the railroad as indicated in the passages quoted above, the Court placed its decision squarely on the "nature of the title" to the right of way. 190 U. S. at 271.**

In describing the railroad's interest in the lands comprising the right of way as a "limited fee," the Court in *Townsend* was correctly using a term which has a settled meaning in real property law. The term "limited fee" (and its synonyms, a "defeasible" or "qualified" fee) is traditionally used to refer to an estate in fee simple which will continue until the occurrence of a stated event, at which time the estate may revert to the grantor. Kent's

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*Emphasis in quotations throughout this brief is added, unless otherwise noted.

**Petitioner's suggestion that *Townsend* supports its argument that the right of way can be used only for railroad purposes is discussed at pp. 37-38, *infra*.

Commentaries, Vol. 4, p. 10 (Holmes ed., 1873);* Blackstone's Commentaries, Vol. 2, pp. 109-110 (9th ed. 1783); Restatement, Property, Sec. 23, p. 57.** Under this long-established definition, the fee is limited only as to duration. It is a fee simple so long as the estate continues in existence. But it is a limited or defeasible fee because there is the possibility that the estate may come to an end at some future time.***

Even earlier the Court had authoritatively determined the nature of the pre-1871 right of way grants in the *Baldwin, Roberts* and *New Mexico* cases. *Railroad Company v. Baldwin,* 103 U. S. 426, involved the Act of July 23, 1866, 14 Stat. 210, granting a right of way for the St. Joseph & Denver City Railroad. This grant was similar in all important respects to the Union Pacific right of way grant of 1862. Baldwin claimed a portion of the St. Joseph & Denver City right of way under a location made after the date of the grant but before the definite location of the road. The Court rejected Bald-

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*As an example of the kind of an act or event which would cause the estate to terminate, Kent cites the case of "a limitation to a man . . . so long as St. Paul's church shall stand, . . ." Kent then adds the following comment: ". . . It is the uncertainty of the event, and the possibility that the fee may last forever, that renders the estate a fee, . . ." (p. 10).

**The Restatement of Property (Sec. 23, Illus. 4, p. 57) gives the following illustration: "A, owning Blackacre in fee simple absolute, transfers Blackacre 'to the Town of B and its successors and assigns to be held by it and them so long as the said Blackacre is used for public school purposes.' Town B has an estate in fee simple determinable. A has a possibility of reverter." In the terminology of the Restatement, a fee simple determinable is a type of fee simple defeasible (see §44).

***Whether upon cessation of railroad operations the reversion is automatic or requires affirmative action need not be considered, because the rights of the grantee prior to the reversion are the same in either case. Restatement, Property, §193.

win's claim, holding that the railroad grant was *in praesenti* and that as soon as the route was definitely fixed, the title attached as of the date of the original Act. As to the nature of the right of way grant, the Court held:

> ". . . It is a present absolute grant, subject to no conditions except those necessarily implied, such as that the road shall be constructed and used for the purposes designed. Nor is there anything in the policy of the government with respect to the public lands which would call for any qualification of the terms. . . ." 103 U. S. at 429-430.

Petitioner attempts to minimize the significance of this case by stating that the "ruling might have rested" solely on the fact that "If the company could be compelled to purchase its way over any section that might be occupied in advance of its location, very serious obstacles would be often imposed to the progress of the road" (Br. pp. 36-37). It is, however, too late to rewrite the opinion, and the fact is that the Court based its holding on the nature of the right of way grant, as indicated in the quotation above.

Missouri, Kansas & Texas Ry. Co. v. Roberts, 152 U. S. 114, involved a grant made in 1866, 14 Stat. 289, to the Union Pacific Railway Company, Southern Branch, the name of the grantee being later changed to Missouri, Kansas & Texas Ry. Co. A basic problem in the case was whether the grant of the right of way conveyed lands wholly within an Indian Reservation. The Court concluded that the fee to the land within the Indian Reservation had always been in the United States, subject only to the Indian right of occupancy, and that therefore the United States could and did grant the right of way "to the company unconditionally." 152 U. S. at 116. Since the right of way grant under consideration was similar

in all important respects to the 1862 grant to Union Pacific, the following quotations are especially significant:

> "The United States had the right to authorize the construction of the road of the Missouri, Kansas and Texas Railway Company through the reservation of the Osage Indians, and to grant absolutely the fee of the two hundred feet as a right of way to the company."
>
> ". . . That grant [*i. e.*, M. K. & T. right of way] was absolute in terms, covering both the fee and possession, ..."
>
> "The right and power of the government to dispose of the fee of the lands in controversy occupied by the Osage Indians, with their rights of occupancy, having been exercised, and a grant of both fee and possession having been made to the Missouri, Kansas and Texas Railway Company, ..." 152 U. S. at 116-118.

New Mexico v. United States Trust Co., 172 U. S. 171, involved the right of way granted to the Atlantic & Pacific R. Co. by the Act of July 27, 1866, 14 Stat. 292. This grant contained a provision exempting the railroad right of way from taxation within Territories. The then Territory of New Mexico claimed the right to tax the buildings and other improvements located on the right of way as personal property. In support of this claim it was urged that the right of way was granted only as an easement and that the improvements were not part of the realty. The Territory's power to tax turned on whether the Railroad Company owned its right of way in fee or as an easement.

The Court in the *New Mexico* case emphasized that whether the term "right of way" was used in the sense of

conveying a fee in the land itself or merely to signify a right of passage depended on the intention of Congress. Upon examining the statute the Court found that Congress intended to and did grant the fee in the land itself, not merely the abstract right of use. In support of this holding, the Court relied on *Missouri, Kansas & Texas Ry. Co. v. Roberts, supra:*

> ". . . So this court in *Missouri, Kansas & Texas Railway v. Roberts,* 152 U. S. 114, passing on a grant to one of the branches of the Union Pacific Railway Company of a right of way two hundred feet wide, decided that it conveyed the fee." 172 U. S. at 182.

New Mexico had sought to escape the force of the *Roberts* case by contending that "the distinction between an easement and the fee was not raised" in the argument in that case. But the Court rejected this contention, holding as follows:

> ". . . The difference between an easement and the fee would not have escaped his [Mr. Justice Field's] attention and that of the whole court, with the inevitable result of committing it to the consequences which might depend upon such difference." *(Ibid.)*

The reference in the quotation to "the consequences which might depend upon such difference" emphasizes that the Court in the "limited fee" cases did not use the terms "fee" and "easement" carelessly and loosely. In *New Mexico* an exemption from taxation was the consequence of the holding that the right of way was granted in fee rather than as an easement; so also is it a consequence of that holding that the grantee is entitled to take the minerals.

Petitioner tries to brush the *New Mexico* case aside by arguing that it is "questionable" whether the Court was required "to reach the question of the railroad's interest" and by stating that "it could well have been held that such improvements were in contemplation when the granting Act was passed, regardless of what the interest of the company might be" (Br. p. 35). The short answer to this argument is that the Court did reach the question of the nature of the railroad's interest and did hold that it was a fee in the land itself. Petitioner only underscores the importance of the actual holding by claiming that the decision "could well have been" placed upon some other ground.

Another decision of this Court defining the nature of the railroad's interest is *Clairmont v. United States*, 225 U. S. 551. In that case the defendant was charged with the criminal offense of introducing liquor into Indian country. The alleged offense had been committed while the defendant was traveling with liquor in his possession on a train at a point where the Northern Pacific right of way which had been granted by the Act of July 2, 1864, 13 Stat. 365, passed through an Indian Reservation. In holding that the right of way was not "Indian country" and therefore that the indictment must be quashed, Mr. Justice Hughes for the Court stated that:

> ". . . by the grant of Congress the railroad company obtained the fee in the land constituting the 'right of way' . . ." 225 U. S. at 556.

While of course this case does not specifically hold that the railroad owns the minerals contained in the right of way, that conclusion is the legal consequence of the Court's statement that the railroad obtained the "fee in the land" comprising the right of way.

Likewise significant is *Missouri, Kansas & Texas Ry. Co. v. Oklahoma*, 271 U. S. 303, where the railroad and the City of McAlester had agreed that openings and crossings under the railroad were to be constructed at the sole expense of the city. The state Corporation Commission ignored the agreement and ordered the railroad to construct crossings and pay half the cost. The railroad had been built on the right of way granted by Congress under the Act of July 26, 1866, 14 Stat. 289, the same Act considered in the *Roberts* case. In upholding the agreement and setting aside the order of the state Commission, the Court relied upon the nature of the Company's interest in its right of way:

> ". . . The company owned its right of way lands and station grounds in fee. . . . It was entitled to compensation for any of its property that might be taken or damaged by the construction and use of the crossings." 271 U. S. at 308.

Petitioner's comment (Br. p. 38) that there was "no real construction of the grant" is based upon the untenable assumption that the Court used the historic word of art, "fee," carelessly and without regard for its consequences.

In addition to the foregoing cases referring to 1864 and 1866 rights of way which are similar to the 1862 Union Pacific grant, there are two cases which specifically involve Union Pacific's title to its right of way. In *Union Pacific R. Co. v. Snow*, 231 U. S. 204 and *Union Pacific R. Co. v. Sides*, 231 U. S. 213, this Court reinstated trial court judgments which decreed that under its 1862 grant, Union Pacific is "the owner in fee and entitled to the possession of each and every part" of its right of way. The trial court judgments, while not set forth in this Court's opinion, were contained in the records on appeal and were

thus before the Court.* The importance of these decrees cannot be minimized by asserting that the exact nature of the railroad's interest was not in issue, for, as we have pointed out, a similar argument was explicitly rejected by this Court in *New Mexico v. United States Trust Co.*, 172 U. S. at 182.

Petitioner seeks to explain away the foregoing line of cases by claiming that the rights asserted, "if sustained, would have impaired the use of the right of way for railway purposes." (Br. pp. 9, 40.) The facts do not support this alleged distinction. In three of the foregoing limited fee cases, no claim was made which would in any way have "impaired the use of the right of way for railway purposes." *M. K. & T. Ry. v. Oklahoma*, 271 U. S. 303; *New Mexico v. United States Trust Co.*, 172 U. S. 171; *Clairmont v. United States*, 225 U. S. 551.

The decisions of this Court establishing the limited fee principle were reviewed and applied in *United States v. Illinois Central R. Co.*, 89 F. Supp. 17 (E. D. Ill. 1949), aff'd, 187 F. 2d 374 (7th Cir. 1951), where it was held that the railroad was entitled to take the minerals within its right of way. In that case, Congress made the original grant in 1850 to the State of Illinois for the purpose of aiding in the construction of a railroad, and the State of Illinois was authorized to grant and did grant the right of way and adjacent sections to Illinois Central for that purpose. The language of the Congressional grant to Illinois is almost identical with the grant of the right of way to Union Pacific. After carefully analyzing the

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*Transcript of Record, p. 16, *Union Pacific R. Co. v. Snow*, 231 U. S. 204; Transcript of Record, p. 16, *Union Pacific R. Co. v. Sides*, 231 U. S. 213.

precedents, the District Court held that Illinois Central has a limited fee in its right of way:

> "In the same opinion [the *Great Northern* opinion] the court distinguishes between the periods in the legislative and economic history of the United States from 1850 to 1871 and the period following 1871 in relation to the grants of lands from public domain to encourage the building of railroads and the Congressional attitude toward such grants. It points out that the period beginning in 1850 was characterized by a Congressional policy of subsidizing railroad construction by lavish grants from the public domain of which the Illinois Central Grant here in question, *together with the Union Pacific Grant of July 1, 1862,* Chap. 120, 12 Stat. at L. 489; the Amended Union Pacific Grant, Act of July 2, 1864, Chap. 216, 13 Stat. at L. 356; and the Northern Pacific Grant, Act of July 2, 1864, Chap. 217, 13 Stat. at L. 365, are referred to as being typical of the period. . . ."
>
> "Applicable to the period to which the Illinois Central Grant belongs is the case of *Northern Pacific Railway Company v. Townsend,* 190 U. S. 267, . . ."
>
> "On the authority of the *Northern Pacific* case it must be held that the defendant by its deed from the State of Illinois given pursuant to said grant in the Act of 1850, received and holds a limited fee in its right of way subject to an implied condition of reverter in the event it ceases to use or retain the right of way for the purpose for which it was granted." 89 F. Supp. at 21-23.

On appeal the Court of Appeals for the Seventh Circuit affirmed this decision and adopted the opinion of the District Court. 187 F. 2d 374 (1951). The United

States did not seek certiorari. Thus, the *Illinois Central* case stands as the latest in a uniform line of decisions which establish that rights of way such as that granted to Union Pacific are limited fees.

B. As Holder of a Limited Fee in the Right of Way Lands, Union Pacific Is Entitled to Take the Minerals.

In the foregoing section, we have shown that the 1862 Act granted Union Pacific a limited fee in the lands comprising its right of way which will continue as long as railroad operations are maintained. In this section, we consider whether the holder of such an interest under the 1862 Act has a right to take and develop the minerals contained in the right of way.

1. The Holder of a Limited Fee Has the Same Rights as an Owner in Fee Simple.

It is well-settled that the owner of a limited, defeasible or qualified fee has, so long as the estate continues, the same rights as an owner in fee simple absolute to take the minerals.* This proposition is expressed in Kent's Commentaries, Vol. 4, p. 11 (Holmes ed. 1873), as follows:

> ". . . the proprietor of a qualified fee has the same rights and privileges over the estate as if he were a tenant in fee simple; . . ."

*The elementary principle that a holder of a fee simple is entitled to take the subsurface minerals is stated in 1 Tiffany, Real Property, §33, p. 47 (3d ed.); see also *Del Monte Mining and Milling Co. v. Last Chance Mining and Milling Co.*, 171 U. S. 55, 60.

And again in Am. Jur., Estates, §30, p. 490:

> "The proprietor of a determinable, qualified, or base fee has the same rights and privileges over his estate, until the qualification on which it is limited is at an end, as if he were a tenant in fee simple."

Other texts and digests announce the same rule. 1 Tiffany, Real Property, §220, p. 387 (3d ed.); C. J. S., Estates §10, pp. 23-24. It is summed up in the Restatement of Property, Section 193, Comment "h," p. 799, as follows:

> "Thus the owner of an estate in fee simple defeasible or in fee simple conditional normally is not restricted in cutting timber for sale, in opening mines, *in drilling for oil,* or in removing or altering buildings."

A leading case for this proposition is *Davis v. Skipper,* 125 Tex. 364, 83 S. W. 2d 318 (1935), where the plaintiffs, who held a possibility of reverter in lands which their predecessors had granted for church purposes, were not permitted to enjoin the church from drilling. The Court said:

> "So long as there is no abandonment of the land for church purposes, the trustees of the church have therein what has been termed a 'base, qualified or determinable fee.' Such an estate is a fee, because by possibility it may endure forever; but 'as it depends upon the concurrence of collateral circumstances which qualify and debase the purity of the donation, it is therefore a qualified or base fee.'. . . .
>
> "It follows, therefore, that the grantee under such a deed as is involved here may use the land to the extent of producing the oil and gas therefrom, and,

conversely, the holder of a mere possibility of reverter has no such estate as authorizes him to maintain an injunction to prevent such use of the land. *Williams v. McKenzie*, 203 Ky. 376, 262 S. W. 598; *Hillis v. Dils*, 53 Ind. App. 576, 100 N. E. 1047, 1049, 102 N. E. 140; *Gannon v. Peterson*, 193 Ill. 372, 62 N. E. 210, 55 L. R. A. 701; *Landers v. Landers*, 151 Ky. 206, 151 S. W. 386, Ann. Cas. 1915A, 223; *Dees v. Cheuvronts*, 240 Ill. 486, 88 N. E. 1011; *Hopper v. Barnes*, 113 Cal. 636, 45 P. 874, 875; *New Jersey Zinc & Iron Co. v. Morris Canal & Banking Co.*, 44 N. J. Eq. 398, 15 A. 227, 1 L. R. A. 133.

"These cases, as well as others which could be cited, are so directly in point as to be decisive of the question. . . ." 83 S. W. 2d at 320.

A recent case illustrating the same rule is *Frensley v. White*, 208 Okla. 209, 254 P. 2d 982 (1953). The court held that a grant for "so long as said premises shall be held, kept and used by said church . . . for a place of divine worship" did not preclude the simultaneous use of the premises by the grantee for the production of oil and gas and for other purposes.

An important line of federal cases reflects the rule that the holder of a limited or defeasible fee has the same rights as an owner in fee simple until the happening of the event on which the estate is limited. In eminent domain cases, federal courts uniformly award the holder of a limited fee or comparable estate the full value of the property if the happening of the event on which the estate is limited is not imminent, and no award is made to the holder of the reversionary interest. *United States v. 1119.15 Acres*, 44 F. Supp. 449 (E. D. Ill., 1942); *United States v. 16 Acres*, 47 F. Supp. 603 (D. Mass., 1942); *People of Puerto Rico v. United States*, 132 F.

2d 220 (1st Cir., 1942). The award of full compensation to the holder of the present interest in these cases squarely negatives any suggestion that the right to take the minerals is vested in anyone else.

The principle that the holder of a limited fee can take the minerals was applied in the *Illinois Central* case. After concluding that the railroad holds a limited fee in its right of way, the court there considered "the incidents of a limited fee title" under Illinois law and held:

> "The rule in Illinois is to the effect that title to the minerals underlying the surface with the right to extract them pass with a base or conditional fee. *Dees v. Cheuvronts,* 240 Ill. 486, 487, 88 N. E. 1011; *Regular Predestinarian Baptist Church of Pleasant Grove v. Parker,* 373 Ill. 607, 27 N. E. 2d 522, 137 A. L. R. 635; *Carlsen v. Carter,* 377 Ill. 484, 36 N. E. 2d 740. It would seem, therefore that title to the minerals underlying the surface of the railroad right of way is in the defendant with the power to extract and use unless such extraction in some way impairs the efficacy of the grant or the use of the granted right of way for railroad purposes." 89 F. Supp. at 23.

The law of Illinois was deemed to be controlling in view of the maxim that "whatever incidents or rights attach to the ownership of property conveyed by the government will be determined by the states . . ." 89 F. Supp. at 23; see *Packer v. Bird,* 137 U. S. 661, 669; *Northern Pacific Ry. Co. v. Townsend,* 190 U. S. at 270. However, since the United States argued that state law is inapplicable, the Court also considered the question from the standpoint of federal law and arrived at the same result:

> "Even though the contentions of plaintiff were accepted that State law can have no weight in deter-

> mining the rights of defendant under the limited fee granted by Congress there seems to be ample authority in the Northern Pacific case, supra, and in the history and background of the grant discussed in that case and in the Great Northern case, supra, to make it appear that it was the intent of Congress to withhold for the United States only the right of reversion required to insure as far as possible the perpetuation of the operation of the railroad, the construction of which the grant was to aid and make possible." 89 F. Supp. at 24.

This holding is directly applicable to the Union Pacific grant.*

Uniform judicial recognition that the holder of a limited fee can take the minerals leaves no room for petitioner's argument (Br. pp. 47-48) that the application of state law might produce results which would vary from state to state.** Whatever law is applied, the United States

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*Petitioner contends that the *Illinois Central* case is distinguishable because "the Act contained no express indication that Congress intended to withhold minerals" (Br. p. 47). It is true that in the Union Pacific grant, there was an exception of mineral lands from the "place lands" granted in aid of construction, whereas there was no such exception in the Illinois Central grant. However, as petitioner concedes (Br. pp. 26, 30n), the exception of mineral lands in the Union Pacific grant applied only to the alternate sections adjacent to the right of way and could not apply to the right of way itself. So far as the right of way is concerned the *Illinois Central* case is on all fours with the case at bar.

**The law in Wyoming, where the right of way involved here is located, is in accord with the uniform view. Although no Wyoming case squarely rules the question, the Wyoming Supreme Court in *Johnson Irrigation Company v. Ivory*, 46 Wyo. 221, 239, 24 P. 2d 1053, 1058 (1933), said:

> ". . . a grantee who takes a limited or qualified fee, liable to be defeated whenever he ceases to use the land for the purposes specified in the grant, may, while the estate continues, have the same rights and privileges as an owner in fee simple."

has only a reversionary interest and is not entitled to prevent Union Pacific from taking the minerals so long as the estate continues.

2. The Right of Way May Be Used for Any Purpose Which Does Not Interfere With Railroad Operations.

It is clear that operations for the development of minerals can be undertaken on the Union Pacific right of way without interfering with railroad operations. The trial court found as a fact that "Defendant's proposed drilling operations and the removal, use and disposal of subsurface oil and other minerals will in no way interfere with the use of the right of way for railroad and telegraph purposes" [R. 13]. This finding is not challenged by petitioner.

It has long been the practice of railroads to use or authorize others to use portions of their rights of way for non-railroad purposes which do not interfere with railroad operations, and the courts have regularly approved the practice. In *Northern Pacific R. Co. v. Smith*, 171 U. S. 260, 275-276, the Court noted that:

> ". . . the railroad company was in actual possession thereof by its tenants. The precise character of the business carried on by such tenants is not disclosed to us, but we are permitted to presume that it is consistent with the public duties and purposes of the railroad company; . . ."

The propriety of using portions of the right of way not presently needed for railroad operations for other purposes which do not interfere with railroad operations has also been recognized in *M. K. & T. Ry. Co. v. Oklahoma*, 271 U. S. 303 (underpass); *United States v. Illinois Central R. Co.*, 187 F. 2d 374 (7th Cir. 1951) (oil development);

Northern Pacific Ry. Co. v. North American Telegraph Co., 230 Fed. 347, 349-350 (8th Cir. 1915) (competing telegraph line); *Mize v. Rocky Mountain Telephone Company*, 38 Mont. 521, 100 Pac. 971, 974 (1909) (irrigation ditch on Northern Pacific right of way); *Johnson v. Union Pacific R. Co.*, 133 Neb. 243, 274 N. W. 581, 584 (1937) (retail lumber business). *Cf.* cases cited pp. 29-32, *supra*. In the *Johnson* case, the Court, referring specifically to the Union Pacific right of way, said:

> "Both the supreme court of the United States and the interstate commerce commission have adopted the general rule that a railroad right of way adjacent to tracks, when not a part of railroad transportation facilities devoted or necessary to public use, is private property of the carrier and that the latter may lease it for private purposes to one or more persons and deny a like privilege to others. Donovan v. Pennsylvania Co., 199 U. S. 279, 26 S. Ct. 91, 50 L. Ed. 192; Andrews Bros. Co. v. Pennsylvania R. Co., 123 I. C. C. 733. . . ." *Ibid.*

Notwithstanding these authorities, petitioner argues (Br. p. 17) that the Union Pacific right of way was "granted only for purposes of construction" and cannot be used for any purpose other than railroad and telegraph operations. The critical defect in this argument is that it tries to rewrite the grant to Union Pacific as if it were a grant "of the right of way to the extent necessary for the operation of the railroad and telegraph lines and for no other purpose." If Congress had intended that the use of the right of way should be so limited, it would have said so. *Cf.* 23 Stat. 73; 26 Stat. 783. The absence of such a limitation in the 1862 Act shows that the right of way can be used for any purpose that does not interfere with railroad operations.

Petitioner's reliance on *Caldwell v. United States*, 250 U. S. 14, serves to point up the fallacy in its argument that the right of way can be used only for railroad purposes. The statutory provision involved in *Caldwell* authorized the railroad "to take, from the public lands adjacent to the line of said road, material, earth, stone and timber necessary for the construction of said railroad." The grant was restricted by its terms to the single specified use—*i. e.*, that "necessary" for the construction of the railroad—and thus the Court properly held that the railroad was not entitled to the proceeds from sale of tree tops which were admittedly not used for construction of the railroad. *Cf. United States v. Denver and Rio Grande Ry. Co.*, 150 U. S. 1, 11. However, the grant in issue here is not limited to a single specified use and accordingly there is no basis for preventing the railroad from using portions of its right of way for purposes which do not interfere with railroad operations.

Likewise distinguishable is *Los Angeles & Salt Lake R. Co. v. United States*, 140 F. 2d 436 (9th Cir. 1944), cert. denied, 322 U. S. 757, which petitioner cites in support of its statement that a limited fee does not necessarily include a conveyance of minerals (Br. p. 34). That case involved a grant to the United States of certain property for the purposes of a free, public, navigable channel with a specific proviso for reverter if the property *"be used for any purposes other than specified herein."* 140 F. 2d at 436-437. The specific condition of reverter in the event of any other uses places that case in a special category of cases which are sharply distinguishable from the Union Pacific grant. In such cases, a specific use is declared to be exclusive and the grant by its terms prevents all other uses. This was the basis for the court's decision in the *Los Angeles & Salt Lake Railroad Co.*

case. Such cases are not in point here, for the right of way was granted to Union Pacific "to have and to hold the same so long as it was used for the railroad right of way." *Cf. Northern Pacific Ry. Co. v. Townsend*, 190 U. S. at 271. There is no provision, either expressed or implied, for a reversion in the event of other uses, so long as the designated use is continued.

The *Los Angeles & Salt Lake Railroad* case illustrates the vital distinction between (1) a defeasible fee in which a particular use is specifically declared to be exclusive and the grant, by its terms, prevents all other uses, and (2) a defeasible fee in which the purpose of the grant is specified but the grant does not prevent use for other purposes so long as the specified use is maintained. In the first case, the use for any purpose other than the specified purpose is generally held to terminate the grant, whereas in the second case the only event which can bring about a termination of the fee is the cessation of the specified use. The Union Pacific grant is of the second type—the sole event which could cause a reverter is the cessation of railroad operations. As we have shown pp. 29-34, *supra*, the authorities are uniform in holding that the owner of a limited fee of the second type has all the rights of an owner in fee simple so long as the estate continues.

Contrary to petitioner's suggestion (Br. p. 35), its position is not strengthened by the comment in the *Townsend* case that the right of way "was explicitly stated to be for a designated purpose . . ." 190 U. S. at 271. That observation was made in the context of the Court's holding that an adverse possessor could not be permitted to frustrate the congressional purpose in granting the right of way. But the fact that the grant was made to accomplish a "designated purpose" does not show that a

portion of the lands granted cannot be used by the grantee for another purpose which does not interfere with the designated purpose. Indeed, the Court in *Townsend* made it plain that there is no restriction on the railroad's use of the right of way so long as railroad operations continue:

> ". . . Congress . . . plainly manifested its intention that the title to and possession of the right of way should continue in the original grantee, its successors and assigns, so long as the railroad was maintained . . ." 190 U. S. at 272.

In view of these authorities, it is clear that so long as Union Pacific continues to operate its railroad, it is entitled to develop and take the minerals in the lands comprising the right of way.

3. No Rule of Construction Prevents the Minerals From Passing to Union Pacific.

In support of its argument that Union Pacific has only a "surface use of the right of way" and cannot take the minerals, petitioner advances a strict construction argument, urging that with respect to federal grants, nothing passes but what is conveyed in clear and explicit language (Br. p. 11). From this petitioner asserts that the railroad must be able to point out language in the grant specifically conveying the minerals (Br. p. 12).

No canon of strict construction has ever been held to require, as petitioner would have it, that every right of the grantee and every item to be granted must be specifically spelled out in a grant or conveyance by the federal government. Such a rule would mean that the federal

government could not use words of art or technical terms of conveyancing which have come to have a precise meaning in centuries of practical use and judicial construction.

If Congress granted "title" to land without referring to minerals, the grantee certainly would not be precluded from ownership of the minerals by any rule of construction, even though there was no language in the grant expressly conveying them. Indeed, the Court has stated: "The general rule of the common law was that whoever had the fee of the soil owned all below the surface, and this common law is the general law of the States and Territories of the United States, and in the absence of specific statutory provisions or contracts, the simple inquiry as to the extent of mining rights would be, who owns the surface." *Del Monte Mining Co. v. Last Chance Mining Co.*, 171 U. S. 55, 60.

In that case the Court emphasized that "the possible fact of a separation between the ownership of that surface and the ownership of the mines beneath the surface, growing out of contract, in no manner abridged the general proposition that the owner of the surface owned all beneath." *Ibid.*

The proposition that minerals pass to a grantee of the Federal Government although they are not specifically mentioned in the grant is illustrated by the decisions of this Court in *United States v. Wyoming*, 331 U. S. 440 and 335 U. S. 895. In the earlier decision the Court held that the United States, not the state of Wyoming,

had title to certain school lands in Wyoming and referred to a Special Master the claim of the United States for damages arising out of oil operations on the property by the State's lessee, the Ohio Oil Company. After the first decision, Congress passed an Act directing the Secretary of the Interior "to issue a patent" to Wyoming for part of the land, with "title" thereto considered to have been vested in Wyoming on July 10, 1890. 62 Stat. 1233. In the subsequent decision, the Court held that the issuance of the patent obviated the necessity of considering the claim for damages "Inasmuch as the patent issued by the United States vests title to said land in the State of Wyoming during the entire period of possession by the defendant Ohio Oil Company . . ." 335 U. S. at 896.

Although the federal statute in the *Wyoming* litigation did not convey the minerals to Wyoming in explicit language, this Court had no difficulty in concluding that the "title" which passed to Wyoming included the minerals as well as the surface. Similarly, in the present case, no rule of construction prevents the Court from holding, in accordance with settled principles of the law, that the grant to Union Pacific of a "limited fee" in the right of way included the right to develop the minerals. It is sufficient that Congress, in its right of way grant to Union Pacific, used language conveying an estate which invariably has been held to include the minerals.

II.

The Federal Mineral Policy in 1862 and the History of the Union Pacific Act Show That the Right of Way Grant Included the Minerals.

In considering this section of the brief, it is important to differentiate between (1) an exception of mineral lands and (2) a reservation of mineral rights. An exception of mineral lands constitutes a complete exclusion from a land grant of all lands which contain minerals.* A reservation of mineral rights refers to the separation of the surface of the property from the underlying minerals, with the surface being granted and the mineral rights being withheld by the grantor.**

Petitioner places major emphasis on the argument that there was operative in 1862 a federal policy which requires the Court to hold that the mineral rights in the right of way were reserved and retained by the United States (Br. pp. 18-30). There is no express reservation of mineral rights from the Union Pacific grant, and petitioner does not so claim. And petitioner concedes that an

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*A typical exception of mineral lands is that contained in the Morrill Act, 12 Stat. 503 (1862): "That there be granted to the several States, for the purposes hereinafter mentioned, an amount of public land, to be apportioned to each State a quantity equal to thirty thousand acres for each senator and representative in Congress to which the States are respectively entitled by the apportionment under the census of eighteen hundred and sixty; *Provided*, That no mineral lands shall be selected or purchased under the provisions of this act."

**A typical reservation of mineral rights is that contained in the Stock-raising Homestead Act, 39 Stat. 862, 864 (1916): "That all entries made and patents issued under the provisions of this Act shall be subject to and contain a reservation to the United States of all the coal and other minerals in the lands so entered and patented, together with the right to prospect for, mine, and remove the same."

exception of mineral lands cannot be applied to the right of way (Br. pp. 26, 30n). Thus, petitioner's position is that a reservation of mineral rights in the right of way must be implied on the basis of a mineral policy which allegedly was operative in 1862 and was embodied in the grant.

The Court below, sitting in a circuit where there is a special familiarity with mineral rights problems, rejected this attempt to graft a reservation of mineral rights on to the right of way grant [R. 23-24]. The Court pointed out that petitioner's argument incorrectly "assumes that a policy of retention of the full title to mineral lands is the same as a policy of conveying the fee and reserving mineral rights" [R. 23]. Historical evidence amply supports the Court of Appeals: as we shall demonstrate, (a) the policy of separating the surface rights from the underlying mineral rights relied upon by petitioner was not adopted until half a century after the 1862 Act; (b) the mineral policy actually in effect in 1862 affirmatively supports the conclusion that Congress intended to grant the railroad the right to take and develop the minerals; and (c) an implied reservation of mineral rights is not in accord with the legislative history of the 1862 Act.

A. The Policy of Separating the Mineral Rights From the Surface in Disposing of Public Lands Was Not Established Until After 1900.

A brief examination of the development of the policy of reserving mineral rights will make it abundantly clear that the Court of Appeals was accurate in stating that:

> ". . . The policy of conveying the fee and reserving minerals to the United States was not fully

developed until the passage of the Stockraising Homestead Law in 1916, 43 U. S. C. A. 291, et seq., and the Leasing Act of 1920, 30 U. S. C. A. 181, et seq." [R. 23-24.]

Indeed, as we shall show, the practice in federal grants of separating surface from mineral rights and reserving the mineral rights to the United States did not find legislative expression until as late as 1909 and even then was regarded as a novel departure from long established policy.

Prior to 1900, both mineral and agricultural lands owned by the United States were available for patent in fee under separate groups of statutes. Mineral lands were readily available at nominal prices and without royalty under the Mining Act of July 26, 1866, 14 Stat. 251, the Placer Mining Act of July 9, 1870, 16 Stat. 217, and the Lode Mining Act of May 10, 1872, 17 Stat. 91.* Agricultural lands were freely available under a host of statutes, including the Land Sale Act of April 24, 1820, 3 Stat. 566, the Pre-emption Act of September 4, 1841, 5 Stat. 453, and the Original Homestead Act of May 20, 1862, 12 Stat. 392.

Following the turn of the century a wholly new viewpoint regarding the country's mineral resources began to develop. Public attention was drawn to abuses in connection with the patenting of land with mineral potential as agricultural land and to the overrapid occupancy of the concededly mineral portion of the public domain.

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*When in 1896 the Interior Department ruled that oil lands could not be located or patented under the placer mining laws because oil was not a "mineral" (*Union Oil Co.*, 23 L. D. 222), Congress promptly responded by specifically applying the placer mining laws to oil lands. 29 Stat. 526 (1897).

This induced Presidents Roosevelt and Taft to withdraw vast tracts from occupancy or patent under the land laws until determination was made by the Geological Survey as to their value for minerals, particularly coal and oil. *United States v. Midwest Oil Co.*, 236 U. S. 459, 466-468; Bulletin No. 537, U. S. Geological Survey, pp. 36-39. These withdrawals threatened to freeze such lands from any use for lengthy periods and to cause the eviction of many good faith occupants.

In response to the problems created by these withdrawals, Secretary of the Interior James R. Garfield proposed in his annual report to the President in 1907 that the government adopt a broad new policy of separating the surface from the underlying mineral rights in disposing of coal lands. Secretary Garfield said:

> "I can not urge too strongly the need of a change in the policy hitherto adopted by the Government for the disposition of the coal land . . . The experience in other sections of our country and abroad leads me to believe that the best possible method . . . is for the Government to retain the title to the coal, and to lease under proper regulations which will induce development when needed, prevent waste, and prevent monopoly. Such a method permits the separation of the surface from the coal and the unhampered use of the surface for purposes to which it may be adapted." Report of the Secretary of the Interior, p. 15 (1907).

President Theodore Roosevelt generalized this recommendation to cover all minerals:

> "Rights to the surface of the public land should be separated from rights to forests upon it and to

minerals beneath it, and these should be subject to separate disposal." Vol. 15, Messages and Papers of the Presidents, p. 7266 (Special Message to Congress, Jan. 22, 1909).

Acting on these recommendations, Congress passed the Act of March 3, 1909, 35 Stat. 844, which provided that good faith agricultural entrymen on public lands subsequently classified as being valuable for coal could obtain patents, with coal rights reserved to the United States.* The following colloquy in the House debate on the Act emphasizes that the statutory separation of minerals from the surface was a significant departure from prior policy.

"MR. STEPHENS [Congressman Stephens] of Texas. I desire to know the difference between this law which the gentleman proposes and the law as it now exists. What change is proposed, and why?

MR. MONDELL [Congressman Mondell of Wyoming, Chairman of the House Public Lands Committee]. . . . This bill simply provides that in any case where, subsequent to the location or the entry, the character of the land has been called into question the entryman may, if he so elect, accept a limited patent. It is the first legislation before Congress providing for a limited patent, or a patent reserving the mineral. . . .

MR. STEPHENS. Is it not a fact that valuable minerals are reserved now to the Government?

*This approach was presaged in a few earlier statutes of limited application, including 26 Stat. 502 (1890) (sale of certain public lands to cities for cemetery and park purposes); 26 Stat. 854 (1891) (establishment of court of private land claims to confirm Spanish and Mexican grants); and 34 Stat. 325 (1906) (sale of unallotted Coeur D' Alenes Indian lands).

> MR. MONDELL. No; that is not true. The patent having issued, the patent carries everything in the land with it . . . In other words, the patents issued by the Government of the United States heretofore have been patents in fee." 43 Cong. Rec. 2504 (1909).*

In 1910 Congress supplemented the 1909 statute by providing that surface patents could be granted under the agricultural land laws to future entrymen on lands already withdrawn, classified or known to be valuable for coal. Act of June 22, 1910, 36 Stat. 583. During the debate on this measure, Congressman Mondell referred to a special message to Congress of January 14, 1910, by President Taft on "Conservation of Natural Resources," in which the President stressed the importance of the new approach to the disposition of public lands:

> "The present statutes, except so far as they dispose of the precious metals and the purely agricultural lands, are not adapted to carry out the modern view of the best disposition of public lands to private ownership . . . It is now proposed to dispose of agricultural lands as such, and at the same time to reserve for other disposition the treasure of coal, oil, asphaltum, natural gas, and phosphate contained therein. This may be best accomplished by separating the right to mine from the title to the surface . . ." 45 Cong. Rec. 622, 6041 (1910).

Congressman (later Senate Majority Leader) Robinson, opposing the enactment of the bill, focused upon the

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*Congressman Bonynge, opposing the bill, called the separation approach a "new and untried policy." 43 Cong. Rec. 2506 (1909).

novelty of the concept of separating surface from minerals:

> ". . . under the law as it now exists, there is no segregation of the surface from the coal beneath the surface. Coal lands are enterable only under the coal-land laws. This question as it is presented to the committee in the pending bill is an important one and involves a more radical and far-reaching change in the existing public-land laws than many of the gentlemen in the committee might at first imagine from a casual inspection of the bill." 45 Cong. Rec. 6044.*

In 1912, the statutory policy with respect to coal was extended to oil lands in Utah. Act of August 24, 1912, 37 Stat. 496. Senator Smoot of Utah observed that except for the fact that it applied to oil, the statute was "virtually the same bill" as the 1910 coal act. 48 Cong. Rec. 1756 (1912).

In 1914, the Surface Patent Act made surface rights to withdrawn non-metallic mineral lands generally available. Act of July 17, 1914, 38 Stat. 509. And in 1916, the Stock-raising Homestead Act stipulated that the type of homestead to be created by the Act would entitle the entryman to a surface patent only, with all minerals reserved to the government. Act of December 29, 1916, 39 Stat. 862. The culmination of the development begun in 1909 came in 1920, when the comprehensive federal Mineral Leasing Act provided for exploration and development of the minerals reserved to the government under the 1909-1916 laws. Act of Feb. 25, 1920, 41 Stat. 437.

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*To the same effect, Congressman Morgan noted that ". . . this bill is a new departure in the method of disposing of our public domain." 45 Cong. Rec. 6050.

That these federal statutes signified a new federal policy is uniformly and authoritatively recognized. In *Anderson v. McKay*, 211 F. 2d 798, 803 (D. C. Cir. 1954), the Court commented that:

> ". . . . In 1914 Congress introduced a new concept into the treatment of lands reported to be valuable for certain specified minerals—phosphate, nitrate, potash, oil, gas, or asphaltic minerals. It provided that such land could be entered or purchased and then patented under the non-mineral land laws, but with a reservation to the Government of those minerals . . . ."

Similarly, Morrison and DeSoto, Oil and Gas Rights (1920), states that "The Act of July 17, 1914 . . . was perhaps the first serious attempt, not locally limited, to sever the surface title from the mineral title in disposing of the public domain" (p. 508). The development of the concept of reserving mineral rights in federal grants is also traced in Hibbard, A History of the Public Land Policies, pp. 523-527 (1939); 1911 Annual Report of the Director of U. S. Geological Survey, pp. 246-249; and Bulletin No. 537, U. S. Geological Survey, pp. 36-39, 45-46. Moreover, title insurance companies, in insuring titles under federal patents, regard the Coal Act of March 3, 1909, 35 Stat. 844, as initiating the federal policy of reserving mineral rights in the disposition of the public domain. Cox, Exceptions and Reservations in United States Patents to Public Lands, 35 Title News No. 3, pp. 9, 25 (March 1956); Ogden's California Real Property Law §5.11 (1956).

Petitioner recognizes that "it was in the Stock-raising Homestead Law of 1916, 43 U. S. C. 291, that Congress first provided for issuance of patents with a reservation of minerals" (Br. p. 29n). However, petitioner seeks to minimize the importance of this fact by claiming that it does not show the absence of a policy of reserving mineral rights in 1862 but merely evidences an intention to "eliminate the loophole" through which such a policy had been frustrated. *Ibid.* The historical synopsis set forth above fully refutes petitioner's unsupported claim. Congressional adoption, beginning in 1909, of the technique of separating the surface from the underlying minerals marked an entirely new departure in the disposition of the public domain.

The only authorities cited by petitioner in support of its mineral policy argument purport to show the existence of a policy of excepting mineral lands in 1862. This policy is said to be reflected in Section 3 of the Act which grants the "place lands" and provides that "all mineral lands shall be excepted from the operation of this act."* So far as the "place lands" are concerned, this express exception excludes all mineral lands from the grant. But petitioner admits that this express exception and the alleged policy of excepting mineral lands cannot be applied to the right of way for the obvious reason that such an

*See pp. 58-60 for explanation of the reason why the word "act" was used.

exception "might have made it impossible to construct the road, because few if any, routes were possible which wholly avoided mineral lands" (Br. p. 26). And, again, that "lands which happened to contain minerals could not be totally excepted from the right of way which had to follow a reasonably straight line (Br. p. 30n.).*

Since mineral lands cannot actually be excepted from the right of way, petitioner is forced to argue that the "minerals policy could be and was effectuated, not by excepting the total surface area, but rather by withholding the minerals in the land constituting the right of way" (Br. p. 30n). In other words, petitioner asks the Court to distort an alleged policy of *excepting mineral lands* into the entirely different policy of *reserving mineral rights*, and then to read this transformed policy into the grant of the right of way. Petitioner attempts to justify this distortion by dismissing as "technical" the difference between a policy of excepting mineral lands from public land grants, and a policy of conveying only the surface while reserving the mineral rights (Br. p. 8). But the difference is vastly more than technical. As we have shown, a reservation of mineral rights brings into play a completely different principle—namely, a separation of the property into two estates—and when Congress in

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*This admission is made necessary not only by the physical facts, but also by Section 8 of the Act which directed that the railroad to the Pacific be constructed "upon the most direct, central, and practicable route." The right of way had to be continuous and hence could not jump over or go around any mineral lands that might happen to be in the way.

1909 began to employ this technique, it recognized that it was inaugurating a new policy.

To summarize, it is clear that since the federal policy of reserving mineral rights did not commence until after 1900, there is no basis for petitioner's argument that Congress intended to make such a reservation from the right of way granted to Union Pacific in 1862. In urging that a reservation of mineral rights in the 1862 right of way grant be implied, petitioner is asking the Court to do something which Congress in 1862 certainly would not have done.* A consideration of the federal mineral policy actually operative in 1862, to which we now turn, fully supports this conclusion.

B. The Federal Mineral Policy Operative in 1862 Confirms the Conclusion That Union Pacific Has a Right to Develop the Minerals Within Its Right of Way.

We have already shown that the policy of conveying the surface and reserving mineral rights is of twentieth century origin. We now turn to the period of the Union Pacific grant to determine not only what federal mineral policy in fact existed but the reasons underlying it.

The objective of the federal government in 1862 and, indeed, throughout the nineteenth century was to pro-

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*Even today it is highly doubtful that an implied reservation of mineral rights must be read into every land grant subsequent to 1909 in which the statute is silent with regard to minerals. *United States v. Price*, 111 F. 2d 206 (10th Cir. 1940); Cox, Exceptions and Reservations in United States Patents to Public Lands, 35 Title News No. 3, pp. 23-25 (March 1956).

mote and encourage the exploration and development of mineral resources by private citizens as rapidly as possible. To accomplish this, Congress ordered disposition of mineral lands at nominal prices and without reserving royalty. See *Union Oil Company v. Smith*, 249 U. S. 337, 349; *Mining Company v. Consolidated Mining Company*, 102 U. S. 167, 173.*

From the time of the discovery of gold in California in 1848 until the passage of the Mining Act of July 26, 1866, 14 Stat. 251, Congress "assented to the general occupation of the public lands for mining." *See Atchison v. Peterson*, 87 U. S. 507, 512; *Del Monte Mining Company v. Last Chance Mining Company*, 171 U. S. 55, 62; *Chambers v. Harrington*, 111 U. S. 350, 352. The 1866 Mining Act, which was the first general statute for the disposal of mineral lands, recognized and confirmed the "possessory rights" of miners who had discovered minerals in the public domain. The Act declared unequivocally "that the mineral lands of the public domain . . . are hereby declared to be free and open to exploration and occupation by all citizens of the United States." It further provided for the issuance of patents to mineral lands at nominal prices. From that date until the withdrawals of the early 1900's, mineral lands could be filed upon and patented as readily as agricultural lands. In

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*At first Congress sought to accomplish this by providing that the President might lease lands containing salines and lead, but this practice was abandoned at an early date in favor of disposing of these lands outright to states and private parties. Compare Act of March 3, 1807, 2 Stat. 445, 446 (authorizing leases of lead mines and salt springs), with Act of March 3, 1829, 4 Stat. 364 (providing for sale of lead mines in Missouri), and Act of March 1, 1847, 9 Stat. 146 (providing for sale of lands containing copper, lead and other valuable ores in Michigan).

fact, as late as 1897 Congress provided for the disposition of oil lands in fee under the placer mining laws (see p. 43, *supra*).

If, from the viewpoint of the mid-twentieth century, such a policy of encouraging development of the mineral and agricultural resources of the public domain seems over-generous, it must be borne in mind that the Nineteenth century was the century of the frontier. Minerals were deemed essential to national economic growth, and the mineral resources of the frontier, extending in 1862 from the Mississippi River to the Pacific Ocean, seemed inexhaustible.

It was to facilitate the development of these mineral resources that Congress gradually adopted the policy of segregating the mineral lands from the agricultural lands. Far from seeking to retain the minerals for the federal government, the exception of mineral lands in the grants of "place lands" to railroads was for the purpose of keeping such lands open for rapid mineral development rather than having them occupied for agricultural uses. See *Atchison v. Peterson*, 87 U. S. at 512; *Barden v. Northern Pacific R. Co.*, 154 U. S. 288.

In light of this history it seems clear that petitioner's argument that minerals in the right of way were to be locked up and reserved for the United States is completely at variance with the very policy of mineral development which the government was enthusiastically fostering in 1862, a policy which was reflected in the exception of mineral lands from the grant of "place lands." Since Union Pacific is entitled to exclusive use and possession, its right of way could not have been thrown open to mineral development as were the excepted lands. Thus, the

best way—indeed, in the perspective of 1862, the only way—to insure the development of mineral resources within the right of way was to grant a limited fee, including the minerals, to the railroad.

The historical evidence outlined above led the Court of Appeals to hold that "the governmental policy in effect at the time of the Union Pacific grant, was that a grant or conveyance by the United States carried with it the full title, including minerals" [R. 23]. To support its conclusion, the Court of Appeals properly relied on *Barden v. Northern Pacific R. Co.*, 154 U. S. 288, and *Burke v. Southern Pacific R. Co.*, 234 U. S. 669 [R. 23]. In *Barden* the Court held that the exception of mineral lands from the grant of "place lands" in the 1864 Northern Pacific Act applied to lands not known to be mineral at the time of the enacting statute but found to be mineral prior to the issuance of a patent and the passage of title. However, in *Burke* the Court held that if a patent had issued to the railroad for the alternate sections, complete title, including all minerals subsequently discovered, passed to the railroad notwithstanding the statutory exception of mineral lands.*

The basic principle established by the *Barden* and *Burke* cases is that under these railroad grants, *once title has passed to the railroad*, the Government loses all claim to

*The present vitality of the principle established by the *Burke* case is shown by the fact that it was the basis of the recent decision in *Thomas v. Union Pacific R. Co.*, 139 F. Supp. 588, 591-592 (D. Colo. 1956), aff'd, ... F. 2d ..... (10th Cir., Dec. 24, 1956).

the minerals. This rule applies irrespective of whether there is a patent. The decision in *Shaw v. Kellogg*, 170 U. S. 312, 341, 343, makes it clear that "There is no magic in the word 'patent,'" and that where Congress makes no provision for a patent, none is essential. The decisive factor is whether title has passed, and "in whatsoever manner that is accomplished, the same result follows as though a formal patent was issued." *Ibid.* It is definitely settled that title to the right of way passed to the railroad at least "upon the construction of the road" if not earlier. *M. K. & T. Ry. Co. v. Roberts*, 152 U. S. 114, 116; *Stuart v. Union Pacific R. R. Co.*, 227 U. S. 342, 352. The Union Pacific Railroad was actually constructed, as required by the act of Congress, more than 85 years ago [R. 12].

On a parity of reasoning to the *Barden*, *Burke* and *Kellogg* cases, it follows that when title to the right of way passed to the railroad, there could be no reservation of the minerals in the Government. These cases make it clear that there is no public policy or rule of construction which requires that a reservation of minerals be implied, and indicate that the right to the minerals passed to Union Pacific when construction of the railroad was completed.

Petitioner seeks to distinguish the *Burke* case on the ground that that decision is "based upon considerations peculiar to the objectives of the 'place land' grant" (Br. pp. 27-30). However, analogous considerations with respect to optimum land use, considered in the light of the 1862 policy of encouraging mineral development, support Union Pacific's right to take the minerals within the

right of way. Since Union Pacific was entitled to exclusive use and possession of its right of way, the most efficacious way for Congress in 1862 to insure the early development of the mineral resources within the right of way was to grant a limited fee, including the minerals, to the railroad. And that is what Congress did.

C. An Implied Reservation of Mineral Rights Is Not in Accord With the Legislative History of the 1862 Act.

The segment of legislative history of the 1862 Act primarily relied upon by petitioner (Br. pp. 24-25) is, when fully understood, decisively against petitioner's position that a reservation of mineral rights should be implied in the right of way grant. Representative Cradlebaugh became concerned, as petitioner says (Br. p. 24), about the possibility that "place lands" in the alternate sections adjacent to the right of way, thought to be nonmineral when patented to the company, would turn out to be valuable mineral lands. Accordingly, he proposed an amendment to Section 4 to provide that "all minerals in the lands conveyed" be reserved and that the public be permitted to prospect for them. Congressional Globe, 37th Cong. 2d Sess., Pt. 2, p. 1909.

It is evident that Mr. Cradlebaugh's proposed amendment concerned only the "place lands." Section 4, which he proposed to amend, authorized the issuance of patents to the "place lands" progressively, as each 40 miles of road was completed. That section had nothing to do with the right of way. Moreover, in speaking for his amendment, Mr. Cradlebaugh urged that "these lands, after they shall have been conveyed to the railroad company, shall remain open, to be prospected upon by the public, and if they shall be found to be mineral lands they

shall be thrown open to the public . . . ." *Id.* at p. 1910. It is clear that these comments could relate only to the "place lands," because of the nature and use of the right of way, the fact that it could not be thrown open to the public, and the further fact that it was conveyed to the company by the Act itself and not by subsequent patents.

In replying to Mr. Cradlebaugh, Representative Sargent stated (as petitioner points out) that "The mineral lands through which this road is to pass are already excepted in this bill from the lands to be granted to this company." Petitioner asserts that "no distinction was made . . . between 'place' mineral lands and minerals under the right of way" in Mr. Sargent's statement (Br. p. 25). However, since Mr. Sargent was opposing an amendment which related only to the "place lands," it seems obvious that his assurance concerned the same subject matter. Moreover, in his reply to Mr. Cradlebaugh, Mr. Sargent specifically referred to an exception of "mineral lands," and he made no reference to a reservation of mineral rights.

But there is a more important aspect in this exchange between Mr. Cradlebaugh and Mr. Sargent. What Mr. Cradlebaugh proposed, as we have seen, was a reservation of mineral rights from the grant in fee of the "place lands." Mr. Sargent, who opposed the amendment, made the following comment:

> "This bill proposes for the mineral lands affected by it the same policy that the Government has always pursued, and whenever a change is to be made in that policy I want to be heard upon it more at length than I can be in a five minutes' speech." Congressional Globe, 37th Cong., 2d Sess., Pt. 2, p. 1910.

The existing policy to which Mr. Sargent referred was the policy of excepting mineral lands from the grant of "place lands." The proposal which he rejected as involving a change in the policy of the Government was the proposal to reserve mineral rights in lands actually granted. The House joined him in voting down the proposed amendment. This is the strongest kind of contemporaneous evidence that there was no federal policy of reserving minerals rights from granted lands at the time of the Union Pacific grant.

The legislative history of the exception of mineral lands in Section 3 of the Act is cited by petitioner as "additional evidence" in support of its position (Br. p. 26). Petitioner points out that the exception in Section 3, as it passed the House, read "provided, that all mineral lands shall be exempted from the operation of this section" but that the word "act" was substituted for the word "section" by the Senate. Petitioner recognizes that to apply the exception to the right of way "might have made it impossible to construct the road, because few, if any, routes were possible which wholly avoided mineral lands" (Br. p. 26). However, petitioner attempts to find in this amendment substituting the word "act" for the word "section" an inference of Congressional intention to bar the railroad from obtaining the mineral rights in its right of way. As we shall show, no such inference can be drawn.

A review of the provisions of the Act furnishes a ready explanation for the substitution of the word "act" for the word "section" in the Section 3 exception of mineral lands. In Sections 9, 13 and 14 of the Act, there are provisions authorizing the construction of other railroads

"upon the same terms and conditions, in all respects" as the Union Pacific grant. The "terms," of course, include a grant of "place lands" in aid of construction of those railroads. Thus, in addition to the grant to Union Pacific in Section 3, there were grants of "place lands" to other railroads pursuant to Sections 9, 13 and 14 of the Act. None of these sections contained exceptions of mineral lands. To insure that the mineral land exception in Section 3 would be applicable to the "place land" grants in Sections 9, 13 and 14, it was natural for Congress to change the word "section" to "act" in Section 3 rather than repeating the exception in each of the three sections. Thus, it is clear that Congress, in making this change, did not intend to make the exception of mineral lands applicable to the right of way or to reserve the minerals underlying the right of way.

This Court has recognized that while the grant of "place lands" in aid of construction is subject to several exceptions (*i.e.*, for lands to which homestead or preemption claims have attached, reserved lands and mineral lands), none of these exceptions applies to the right of way grant. In *Railroad Co. v. Baldwin* the court pointed out that in contrast to the grant of "place lands"

> ". . . the grant of the right of way . . . contains no reservations or exceptions. It is . . . subject to no conditions except those necessarily implied, such as that the road shall be constructed and used for the purposes designed." 103 U. S. at 429-430.

Referring to the exceptions in the grant of "place lands", the Court further declared that,

> ". . . Had a similar qualification upon the absolute grant of the right of way been intended, it

can hardly be doubted that it would have been expressed. The fact that none is expressed is conclusive that none exists." 103 U. S. at 430.

The fact that there are no exceptions or reservations from the right of way grant is also forcefully indicated in *Stuart v. Union Pacific R. R. Co.*, 227 U. S. 342, 353, where the Court stated:

> "In this connection it is to be remembered that the grant of the right of way differed from the grant of alternate odd-numbered sections in that, while both were expressed in the words of a grant *in praesenti*, the former was without limitation or exception, while the latter was expressly made subject to the limitation or exception that it should not include any lands which, although public at the date of the grant, were sold, reserved or otherwise disposed of by the United States, or to which a preemption or homestead claim had attached, at the date of definite location."

D. Neither the Administrative Nor Legislative Construction of the 1862 Act Supports Petitioner's Claim.

Petitioner attempts to support its position by referring to the administrative construction of the Act (Br. pp. 48-52). Although petitioner relies on the *Great Northern* case to establish the relevance of prior administrative construction, petitioner fails to mention that it was *"contemporaneous* administrative interpretation" which the Court in *Great Northern* said is pertinent. 315 U. S. at 275. The earliest administrative interpretation relating to minerals within the right of way was in 1905—a full 43 years after the grant to Union Pacific and certainly far from being "contemporaneous." Moreover,

this far-removed administrative interpretation is directly contrary to the established rules concerning the incidents of a limited fee, as outlined above.

Furthermore, these administrative rulings are self-serving, having been made in effect by one of the two parties to the controversy. Judge Learned Hand has pointed out that a public officer whose duty it is to take the Government's side is charged with a very different duty from that of a court called upon to decide a dispute. *Fishgold v. Sullivan Drydock & Repair Corp.*, 154 F. 2d 785, 789 (2d Cir. 1946), aff'd, 328 U. S. 275. "If there is a fair doubt, his duty is to present the case for the side which he represents . . ." *Ibid.* Rulings of the public officer under such circumstances "need not have the detachment of a judicial, or semi-judicial decision and may properly carry a bias." *Ibid.* However, this bias must be taken into account in any judicial determination of the questions involved.*

Petitioner argues that the administrative construction has been endorsed by Congress in the Act of May 21, 1930, 46 Stat. 373, which authorizes the federal government to lease portions of rights of way (Br. p. 51). In the *Great Northern* case, the Court of Appeals, which held

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*"It is pertinent in this connection to point out that Union Pacific Railroad Company, long before the question of ownership of subsurface minerals arose, construed its right of way grant as a grant in fee which included all minerals, and acted upon that construction. This long usage is reflected in the trial court's unchallenged finding:

> "It has long been the practice of the defendant when entering into leases of portions of its right of way to reserve the right to retake possession for mineral operations." [R. 13.]

for the United States, made the following comment with respect to this Act:

> "This statute is little more than a self-serving declaration, as it was enacted at a time when the ownership of the underlying oil had become a subject of controversy." 119 F. 2d at 827.

While it is proper to consider subsequent legislation in the interpretation of prior legislation, this does not prevent a court from concluding that a particular subsequent statute can be largely discounted because of the circumstances of its passage. This is the case with the Act of 1930, both because it is 68 years removed from the 1862 grant and because it is "self-serving."

If the 1930 statute has any relevance at all, it is clearly outweighed by the Act of June 24, 1912, 37 Stat. 138, and the Act of April 28, 1904, 33 Stat. 538. Those statutes validated certain conveyances in fee of part of their rights of way which had been previously made by Union Pacific and Northern Pacific. There was no reservation of minerals in these validating acts. Yet if Congress believed that the United States owned the minerals under the right of way, it seems likely that Congress would have reserved them in validating conveyances in fee by the railroads. In view of the dates of these Acts, they come closer to being contemporaneous constructions by Congress of the 1862 grant than the more recent statute cited by petitioner.

Conclusion.

For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

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January, 1957.

APPENDIX.

Act of July 1, 1862, 12 Stat. 489.

Sec. 2. And be it further enacted, That the right of way through the public lands be, and the same is hereby, granted to said company for the construction of said railroad and telegraph line; and the right, power and authority is hereby given to said company to take from the public lands adjacent to the line of said road, earth, stone, timber, and other materials for the construction thereof; said right of way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad where it may pass over the public lands, including all necessary grounds for stations, buildings, workshops, and depots, machine shops, switches, side tracks, turntables, and water stations. The United States shall extinguish as rapidly as may be the Indian titles to all lands falling under the operation of this act and required for the said right of way and grants hereinafter made.

Sec. 3. And be it further enacted, That there be, and is hereby, granted to the said company, for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores thereon, every alternate section of public land, designated by odd numbers, to the amount of five alternate sections per mile on each side of said railroad, on the line thereof, and within the limits of ten miles on each side of said road, not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached, at the time the line of said road is definitely fixed; Provided, That all

mineral lands shall be excepted from the operation of this act; but where the same shall contain timber, the timber thereon is hereby granted to said company. And all such lands, so granted by this section, which shall not be sold or disposed of by said company within three years after the entire road shall have been completed, shall be subject to settlement and pre-emption, like other lands, at a price not exceeding one dollar and twenty-five cents per acre, to be paid to said company.

Sec. 6. And be further enacted, That the grants aforesaid are made upon condition that said company shall pay said bonds at maturity, and shall keep said railroad and telegraph line in repair and use, and shall at all times transmit despatches over said telegraph line, and transport mails, troops and munitions of war, supplies, and public stores upon said railroad for the government, whenever required to do so by any department thereof, and that the government shall at all times have the preference in the use of same for all the purposes aforesaid, (at fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of service;) and all compensation for services rendered for the government shall be applied to the payment of said bonds and interest until the whole amount is fully paid. Said company may also pay the United States, wholly or in part, in the same or other bonds, treasury notes, or other evidences of debt against the United States, to be allowed at par; and after said road is completed, until said bonds and interest are paid, at least five per centum of the net earnings of said road shall also be annually applied to the payment thereof.

Sec. 8. And be it further enacted, That the line of said railroad and telegraph shall commence at a point

on the one hundredth meridian of longitude west from Greenwich, between the south margin of the valley of the Republican river and the north margin of the valley of the Platte river, in the Territory of Nebraska, at a point to be fixed by the President of the United States, after actual surveys; thence running westerly upon the most direct, central, and practicable route, through the territories of the United States, to the western boundary of the Territory of Nevada, there to meet and connect with the line of the Central Pacific Railroad Company of California.

Sec. 9. And be it further enacted, That the Leavenworth, Pawnee, and Western Railroad Company of Kansas are hereby authorized to construct a railroad and telegraph line, from the Missouri river, at the mouth of the Kansas river, on the south side thereof, so as to connect with the Pacific Railroad of Missouri, to the aforesaid point, on the one hundredth meridian of longitude west from Greenwich, as herein provided, upon the same terms and conditions in all respects as are provided in this act for the construction of the railroad and telegraph line first mentioned, and to meet and connect with the same at the meridian of longitude aforesaid; and in case the general route or line of road from the Missouri river to the Rocky mountains should be so located as to require a departure northwardly from the proposed line of said Kansas railroad before it reaches the meridian of longitude aforesaid, the location of said Kansas road shall be made so as to conform thereto; and said railroad through Kansas shall be so located between the mouth of the Kansas river, as aforesaid, and the aforesaid point, on the one hundredth meridian of longitude, that the several railroads from Missouri and Iowa, herein authorized to connect with the same, can make connection within the limits pre-

scribed in this act, provided the same can be done without deviating from the general direction of the whole line to the Pacific coast. The route in Kansas, west of the meridian of Fort Riley, to the aforesaid point, on the one hundredth meridian of longitude, to be subject to the approval of the President of the United States, and to be determined by him on actual survey. And said Kansas company may proceed to build said railroad to the aforesaid point, on the one hundredth meridian of longitude west from Greenwich, in the Territory of Nebraska. The Central Pacific Railroad Company of California, a corporation existing under the laws of the State of California, are hereby authorized to construct a railroad and telegraph line from the Pacific coast, at or near San Francisco, or the navigable waters of the Sacramento River, to the eastern boundary of California, upon the same terms and conditions, in all respects, as are contained in this act for the construction of said railroad and telegraph line first mentioned, and to meet and connect with the first mentioned railroad and telegraph line on the eastern boundary of California. Each of said companies shall file their acceptance of the conditions of this act in the Department of the Interior within six months after the passage of this act.

Sec. 13. And be it further enacted, That the Hannibal and Saint Joseph Railroad Company of Missouri may extend its roads from Saint Joseph, via Atchison, to connect and unite with the road through Kansas, upon filing its assent to the provisions of this act, upon the same terms and conditions, in all respects, for one hundred miles in length next to the Missouri river, as are provided in this act for the construction of the railroad and telegraph line first mentioned, and may for this purpose, use any rail-

road charter which has been or may be granted by the Legislature of Kansas; Provided, That if actual survey shall render it desirable, the said company may construct their road, with the consent of the Kansas legislature, on the most direct and practicable route west from Saint Joseph, Missouri, so as to connect and unite with the road leading from the western boundary of Iowa at any point east of the one hundredth meridian of west longitude, or with the main trunk road at said point; but in no event shall lands or bonds be given to said company, as herein directed, to aid in the construction of their said road for a greater distance than one hundred miles. And the Leavenworth, Pawnee and Western Railroad Company of Kansas may construct their road from Leavenworth to unite with the road through Kansas.

Sec. 14. And be it further enacted, That the said Union Pacific Railroad Company is hereby authorized and required to construct a single line of railroad and telegraph from a point on the western boundary of the State of Iowa, to be fixed by the President of the United States, upon the most direct and practicable route to be subject to his approval, so as to form a connection with the lines of said company at some point on the one hundredth meridian of longitude aforesaid, from the point of commencement on the western boundary of the State of Iowa, upon the same terms and conditions, in all respects, as are contained in this act for the construction of the said railroad and telegraph first mentioned; and the said Union Pacific Railroad Company shall complete one hundred miles of the road and telegraph in this section provided for, in two years after filing their assent to the conditions of this act, as by the terms of this act required, and at the rate of one hundred miles per year thereafter,

until the whole is completed: Provided, That a failure upon the part of said company to make said connection in the time aforesaid, and to perform the obligations imposed on said company by this section and to operate said road in the same manner as the main line shall be operated, shall forfeit to the government of the United States all the rights, privileges, and franchises granted to and conferred upon said company by this act. And whenever there shall be a line of railroad completed through Minnesota or Iowa to Sioux City, then the said Pacific Railroad Company is hereby authorized and required to construct a railroad and telegraph from said Sioux City upon the most direct and practicable route to a point on, and so as to connect with, the branch railroad and telegraph in this section hereinbefore mentioned, or with the said Union Pacific Railroad, said point of junction to be fixed by the President of the United States not further west than the one hundredth meridian of longitude aforesaid, and on the same terms and conditions as provided in this act for the construction of the Union Pacific Railroad as aforesaid, and to complete the same at the rate of one hundred miles per year; and should said company fail to comply with the requirements of this act in relation to the said Sioux City railroad and telegraph, the said company shall suffer the same forfeitures prescribed in relation to the Iowa branch railroad and telegraph hereinbefore mentioned.

Sec. 17. And be it further enacted, That in case said company or companies shall fail to comply with the terms and conditions of this act, by not completing said road and telegraph and branches within a reasonable time, or by not keeping the same in repair and use, but shall permit the same, for an unreasonable time, to remain

unfinished or out of repair, and unfit for use, Congress may pass any act to insure the speedy completion of said road and branches, or put the same in repair and use, and may direct the income of said railroad and telegraph line to be thereafter devoted to the use of the United States, to repay all such expenditures caused by the default and neglect of such company or companies: Provided, That if said roads are not completed, so as to form a continuous line of railroad, ready for use, from the Missouri River to the navigable waters of the Sacramento River, in California, by the first day of July, eighteen hundred and seventy-six, the whole of all of said railroads before mentioned and to be constructed under the provisions of this act, together with all their furniture, fixtures, rolling stock, machine shops, lands, tenements, and hereditaments, and property of every kind and character, shall be forfeited to and be taken possession of by the United States: Provided, That of the bonds of the United States in this act provided to be delivered for any and all parts of the roads to be constructed east of the one hundredth meridian of west longitude from Greenwich, and for any part of the road west of the west foot of the Sierra Nevada mountains, there shall be reserved of each part and instalment twenty-five per centum, to be and remain in the United States treasury, undelivered, until said road and all parts thereof provided for in this act are entirely completed; and of all the bonds provided to be delivered for the said road, between the two points aforesaid, there shall be reserved out of each instalment fifteen per centum, to be and remain in the treasury until the whole of the road provided for in this act is fully completed; and if the said road or any part thereof shall fail of completion at the

time limited therefor in this act, then and in that case the said part of said bonds so reserved shall be forfeited to the United States.

Act of July 2, 1864, 13 Stat. 356.

Sec. 4. And be it further enacted, That section three of said act [the 1862 act] be hereby amended by striking out the word "five," where the same occurs in said section, and by inserting in lieu thereof the word "ten;" and by striking out the word "ten," where the same occurs in said section, and inserting in lieu thereof the word "twenty." And section seven of said act is hereby amended by striking out the word "fifteen," where the same occurs in said section, and inserting in lieu thereof the word "twenty-five." And the term "mineral land," wherever the same occurs in this act, and the act to which this is an amendment, shall not be construed to include coal and iron land. And any lands granted by this act, or the act to which this is an amendment, shall not defeat or impair any pre-emption homestead, swamp land, or other lawful claim, nor include any government reservation or mineral lands, or the improvements of any bona fide settler, or any lands returned and denominated as mineral lands, and the timber necessary to support his said improvements as a miner or agriculturist, to be ascertained under such rules as have been or may be established by the Commissioner of the General Land Office, in conformity with the provisions of the pre-emption laws: Provided, That the quantity thus exempted by the operation of this act and the act to which this act is an amendment, shall not exceed one hundred and sixty acres for each settler who claims as an agriculturist, and such quantity for each settler who claims as a miner, as the said Commissioner

may establish by general regulation: Provided, also, that the phrase, "but where the same shall contain timber, the timber thereon is hereby granted to said company," in the proviso to said section three shall not apply to the timber growing or being on any land farther than ten miles from the centre line of any one of said roads or branches mentioned in said act, or in this act. And all lands shall be excluded from the operation of this act, and of the act to which this act is an amendment, which were located, or selected to be located, under the provisions of an act entitled "an act donating lands to the several states and territories which may provide colleges for the benefit of agriculture and the mechanic arts," approved July second, eighteen hundred and sixty-two, and notice thereof given at the proper land office.